In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1103

LOCAL UNION NO. 2-477, OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION,

Petitioner

—vs—

CONTINENTAL OIL COMPANY,

Respondent.

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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NO.

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, the Continental Oil Company, requests that the court deny the petition of Local Union No. 2477, Oil, Chemical & Atomic Workers International Union, for a writ of certiorari, to be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered November 7, 1975.

QUESTIONS PRESENTED FOR REVIEW

Respondent disagrees with the Statement of Questions presented by the petitioner and believes the questions posed by this appeal are properly characterized as follows:

1. Whether an Article III court remains free to disregard substantive limitations of authority contained in a collective

bargaining agreement or established by the parties by custom and practice *dehors* the contract or by collateral agreements and impose, instead, its notions of judicial equity?

2. Whether a consolidated arbitration award may be enforced in favor of the Union despite clear evidence of fraud, misrepresentation, illegality and concealment by the union during the hearing on its motion to consolidate two grievances and at the subsequent *ex parte* hearing on the merits of the matters in controversy?

3. Whether the union was bound by collateral agreements with respondent *not* to consolidate grievances 72-1, 71-8 and 72-2, to specifically waive all procedural limitations for processing grievance 72-1, and to table that grievance until completion of all processing on grievance 71-8, and hence, whether that agreement ousted the arbitrator of authority to render any award on 72-1?

Petitioner's Statement of Questions Presented is insufficient, for its issue number one is not involved in this appeal since the parties did have a prior agreement precluding consolidation; issues number two and five were not the basis of decision by the Tenth Circuit, nor the basis of any position taken by Conoco, and hence, are not properly presented to this Court; issues number three and four raise settled matters of federal labor law already decided by this Court and uncontested by respondent; issue number five was not raised in timely fashion below and consideration here is improper. As the questions presented demonstrate, the matter in issue has no broad significance to federal labor law. Each issue raised has already been fully answered by this court and followed consistently by other lower federal tribunals and the Tenth Circuit. The particular facts dictated the result reached. Therefore, this court should deny the Petition for Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent submits its Supplemental Statement of the Case to correct misstatements and omissions in Petitioner's Statement of the Case.

References to petitioner's trial exhibits shall be (Px. ____) references to respondent's shall be (Dx. ____). References to the official reporter's transcript of trial proceedings shall be designated herein as (T ____), and the petitioner shall be designated hereafter as petitioner or "Union" or "Local Union No. 2-477, Oil Chemical & Atomic Workers International Union"; and respondent, Continental Oil Company shall be designated hereafter as respondent, "Conoco", or "Company".

Contrary to Union suggestion, grievances 72-1 and 71-8 were not essentially identical. Although both involved an award of overtime work out of classification (T-11), the facts supporting each incident and certain of the individual grievants differed. Furthermore, Article IV of the parties' collective bargaining agreement, (Appendix D-1-3 to Petition) separated the handling of disputes as grievances from their later handling in arbitration. Physical separation of Conoco's supervisory personnel required joint discussion of numerous grievances between it and the Union.

Article IV of the collective bargaining agreement between these parties specified a three step procedure for adjustment of grievances, beginning with discussions between the shift foreman and Company representative within five days after occurrence. If no resolution is reached at that level, the grievance must be reduced to writing and presented to the local Refinery Manager by the Union's Workmen's Committee. (T-110, 117, 124). If no adjustment can be reached there, all pending matters are considered by the local Workmen's Committee with Conoco's Manager of Refinery Operations, Mr. Tom Zeien, who offices in Houston. If no resolution is reached there, arbitration of each grievance occurs separately under the arbitration procedure outlined in Article V of the parties' collective bargaining agreement (Appendix D-3-4 to Petition). Although those Articles do not speak directly to consolidation of grievances, the practice of the parties has been that once the matter in dispute passes from the grievance to the arbitration stage, joint handling and consideration is foreclosed. As a matter of consistent approach between those parties, consolidation of matters at the arbitration stage

has been precluded. Hence, arbitrator Lazar had no authority under the contract or the national labor laws to consolidate grievance 71-8 with 72-1 and acted improperly when he ultimately did so.

Specifically for grievances 72-1 and 71-8, the parties followed the initial two steps of the grievance procedure and presented them along with many others, to Mr. Zeien, at a meeting held at Conoco's Denver Refinery on February 11, 1972 (T-100). Since Mr. Zeien officed in Houston, he came to Denver infrequently and customarily discussed all pending and unsettled grievances which had arisen since the time of his last visit, and which had reached the third stage of the grievance procedure at a particular refinery, according to the Union's own admissions (T-115, 190). Thus, contrary to the Union's suggestion at page 3 of its Petition, the grievances were not "processed jointly" but were presented to Mr. Zeien at the same time solely for administrative convenience. In fact, at the foregoing meeting, grievances 71-5, 71-6 and 71-7 (Dx. P, Q and R) 71-8, 72-1 and 72-2 (compare T 115, 117-18, 128) were also discussed. At that time the Union did not consider grievances 71-8 and 72-1 identical or consolidated (T-102), and the Union representative had in the past discussed *each separately* with the refinery manager. Since overtime and discipline, which were involved, comprehended "an area of frequent dispute" between these parties (T 118, 119) similar disputes were under constant discussion because these parties did not meet on a daily basis. For convenience many similar and dissimilar grievances were discussed at one time. It is clear from the testimony of the Union representative that disputes were not automatically consolidated or processed as multiple grievances merely because discussed together (T 117-19). Having considered those two matters together, Mr. Zeien analyzed and denied "both grievances" (Px. 6) indicating still-separate treatment but denial of both grievances on the same bases. Contrary to the Union's suggestion, 71-8 and 72-1 were discussed at the same time *only* because they arose at approximately the same period of time and not because they had been consolidated.

Thereafter, pursuant to Article V, of the collective bargaining agreement the parties selected Mr. Steele and Mr.

Allen as their partial arbitrators. Consistent with the practices of the parties under the contract and the parties' understanding that consolidation was improper, appointment of the Union arbitrator for 71-8 (Px. 16) and for 72-1 (Px. 17) was made by separate letter designation. Mr. Allen was appointed partial arbitrator for the company not only on grievances 71-8 and 72-1 but also on 72-2. (T-13, 111, 190, Px. 7).

Because of their designation on more than one grievance, Mr. Allen met with Mr. Steele on grievances 71-8 and 72-1 and with Mr. Dan Edwards, partial Union arbitrator for 72-2 (T191-2) on April 27, 1972, at which time all three disputes were separately read and then discussed by all those present (T-113, 91-92, 94-5) since they "did have similarity" but were not identical. After Mr. Allen stated Conoco's position, the meeting was recessed. Contrary to the Union's suggestion, 71-8, 71-2 and 72-2 were not treated as a "single grievance" (*see* Petition, p. 5), but they were merely discussed together because of similarity.

It is here that the Union's omissions from its Statement of Facts make manifest the misrepresentations and fraud practiced on this Court, for the facts omitted formed the basis for the conclusion by the Tenth Circuit Court of Appeals that grievance 72-1 affirmatively *had not been submitted* to the arbitrator, which the Union "explained" as Mr. Allen's proposal for a joint settlement of joint grievances and the Union's rejection of his position. As the Union knew that contention was false. Within five days, as allowed by Article V for Conoco to respond to any dispute at that stage (T 111,95), Mr. Allen called Mr. Steele on May 2, 1972, (T 192,129), with a separate offer for disposition of *each* grievance (T 191, 96). Mr. Steele admitted that Mr. Allen had called him to discuss *all three*, including 72-2 (T 193, 133), since Mr. Allen had not been able to reach Mr. Edwards on the latter (T 193) and since Mr. Steele was an "official union representative". (T 129) Mr. Steele, in fact, passed the information on 72-2 on to Mr. Edwards (T 129, 133).

In the ensuing discussion over 71-8 and 72-1, although Mr. Allen offered to settle each on the basis of four hours

overtime for one man (T 96, 33), Mr. Steele *acknowledged* each grievance still was *separately identified and treated* by the parties. Mr. Steele told Mr. Allen that the Union would consider Conoco's proposals *on each* and respond (T 193). In place of Mr. Steele, Mr. Edwards responded, rejecting each proposal, and related that the Union had had no change of position. He then asked that the Company proceed to select a neutral arbitrator *for each* (T 193). The parties agreed that "very likely" Mr. Edwards suggested obtaining separate lists of possible names for arbitrators on 71-8, 72-1 and 72-2 (T 130), and he called Mr. Allen (T 132).

Interestingly, the Union did not produce either Mr. Osborne, past chairman of the Union Workmen's Committee, to explain how he treated grievances 71-8 and 72-1 at the refinery level (T 122) – and Mr. Steele was unaware of that – or Mr. Edwards to explain the Union position just prior to arbitration (T 130-132) – and Mr. Steele was unaware of that. The reason was that they were considered and treated separately by the parties. The only later contact between Mr. Steele and Mr. Allen was to explore a second settlement proposal (T 132), and Mr. Steele *admitted* that from his standpoint and up to that point, there was *no agreement*, or pretense of an agreement, *to consolidate* 72-1 and 71-8 (T 135). Most important, Mr. Steele admitted the parties' practice and the Union's view of the contract's substantive requirement that multiple grievances on the same subject could *not* be consolidated without an explicit agreement. By their conduct at all levels, the parties reflected their preference for discussion of grievances in groups but disavowed consolidation in arbitration.

As set forth in Appendix D to the Union's Petition, after a failure of the grievance procedure:

> 3. Upon receipt of the list from the Federal Mediation and Conciliation Service the Company and the Union arbitrators shall select a neutral arbitrator by alternately striking names until one name remains. *Thereafter, the parties shall notify the arbitrator whose name is not eliminated of the precise issue to be arbitrated and*

> *of mutually acceptable dates and places for the holding of the arbitration.*
>
> 4. As soon after his selection as is reasonably practicable the neutral arbitrator shall choose a date and place for hearing, and at such hearing both Company and the Union shall be permitted to have representatives present, and to present evidence and arguments to the neutral arbitrator. Each party shall have the privilege of cross-examining witnesses presented by the opposite party. The decision of the neutral arbitrator shall be rendered in writing in a decision stating reasons for the award within thirty days of the date of the hearing. . . .
>
> 6. *The sole function of the neutral arbitrator shall be to interpret the express provisions of this Agreement and to apply them to the specific facts of the grievance. The arbitrator shall have no power or authority to change, amend, modify, supplement, fill in or otherwise alter this Agreement in any respect.* (Emphasis added).

Sections 3 and 4 mandate appearances by both sides on "mutually acceptable dates" and section 6 carefully circumscribes the *authority* of the arbitrator to deal with *one* grievance. In discharge of his duties under the national labor laws, he had no authority to consolidate, as arbitrator Lazar knew (T 11), or power to hear other than what the parties by *mutual agreement* placed before him.

As the Union acknowledged, separate lists of arbitrators (Dx. J, N) were obtained from the Federal Mediation and Conciliation Service by the Company (Px. 18, 19) with Union consent, knowledge and agreement. Just prior to the receipt of separate lists of arbitrators, despite Mr. Steele's statement that the two grievances "were together," and that no independent action was necessary to combine the grievances before the matter was sent to Union counsel (T 100), in impeachment of that position, he wrote Mr. Allen on May 10, 1972, noting the request for separate lists of arbitrators and asking "*that these two grievances be heard by only one impartial arbitrator,*" renewing a May 3, 1972, request (Px. 8, T 15).

Consistent with the Company's position, Mr. Allen rejected it as contrary to the parties' practice (Px. 5, T 33).

After Mr. Steele failed to obtain consolidation, he turned the matter over to Mr. John McKendree, the Union attorney (T 137). On June 1, 1972, Mr. McKendree contacted Mr. Allen by letter and reiterated the Union's position that, "*We believe two arbitration hearings would be a needless waste of time and expense and contrary to the collective bargaining provisions.*" That was the first time the collective bargaining agreement ever was discussed. Mr. Allen replied on June 7, 1972, denying that separate arbitration hearings of separate grievances was contrary to the collective bargaining agreement, noting that *the contract did not address multiple grievances.* Mr. Allen stated that the facts of the grievances were not the same, even though they were based on the same contract provision (Dx. B). At that time, the company then agreed

> "*. . . to waive the time limitations on grievance 72-1, thereby deferring arbitration until an opinion and decision on grievance 71-8 has been rendered by an impartial arbitrator.* At that time, both parties could decide on the future disposition of grievance 71-1." (Emphasis added).

Mr. McKendree responded to that letter on June 10, 1972, admitting that there was no agreement for consolidation and advising Mr. Allen that he was in the process of conferring with the Union concerning a waiver of time limitations and deferral of arbitration on 72-1 until an opinion and decision on 71-8 had been rendered (Dx. C). On June 19, McKendree restated the proposed agreement and then inquired whether Conoco was willing to dispose of the grievance on the same basis as 71-8. (Dx. S.)

Mr. Allen refused to accept that disposition (Dx. E), and finally Mr. McKendree responded with his crucial letter, dated July 18, 1972, (Dx. G) in which he stated: "*Although we do not agree with all of your statements therein contained, nevertheless, we agree to waive the time limits on grievance 72-1.*" (Emphasis added.) Because of delay due to Mr. Allen's vacation, on August 15, 1972, Mr. McKendree then wrote to

Mr. Allen stating, "We understand that the Company is not promptly complying with the Union's request and the Company's contractual obligation to select an arbitrator on grievance *71-8*," making *no* reference to *72-1*, (Dx. I), and indicating a clear intent to dispose of 71-8 before proceeding to 72-1 (T 15). The reference to waiver of time limits means that neither party would claim the deferred grievance (72-1) was untimely when later discussed after disposition of the first (71-8). Such waiver has no meaning unless one was deferred and to be handled separately from the other. The *parties both agreed on this.* There was a meeting of the minds and substantive *agreement* not to consolidate but *to defer*; as the Tenth Circuit found, without that interpretation there is no meaning to the foregoing correspondence. Mr. Steele received a complete set of that correspondence from Mr. McKendree (T 137) and despite initial disavowal at trial of an agreement not to consolidate, he finally admitted that Mr. McKendree's correspondence reflected an agreement to handle 72-1 after 71-8 and that the file was sent to him to make the request since Mr. Steele had failed (T 139). Mr. Steele then admitted that the Union knew of the agreement to waive time limits on 71-1 and hold it in abeyance because of the correspondence he received (T 139-40), and that the parties considered an explicit agreement necessary to consolidate. The Union itself never filed a grievance for failure to consolidate, nor did any other Union representative (T 140, 210), and their grievances were never consolidated on the forms for 71-8 and 72-1 (Px. 4, 5). *As the Tenth Circuit found, the parties reached a substantive agreement not to submit 72-1 to arbitration; conversely, they submitted only 71-8 to arbitrator Lazar.*

After Mr. McKendree's contacts with Mr. Allen, on behalf of the Union Mr. Abbott directed Mr. Steele to "contact Allen and pick an arbitrator, on grievance 71-8 only" (T 143-144). As he admitted, his contact with Mr. Allen concerned *only* that grievance. When he called him in July, 1972, in Lake Charles, Louisiana, in accordance with the parties' agreement, he requested that the parties strike names *only* on grievance *71-8*, and he *never* mentioned grievance 72-1 (T 144, 136). During that call, Mr. Allen responded that

he could not then since he did not have his list of 71-8 or 72-1 and Mr. Steele related: "*We are agreeing to go along with you. We will waive the time limits on 72-1 and proceed to select an arbitrator for 71-8*" (T 196). Mr. Steele advised that the Union had decided "to waive the time limits on 72-1, which had been [Allen's] suggestion to the Union prior, and in prior letters, and that we would go ahead on arbitration on 71-8" (T 197). No further discussions specifically on picking the arbitrator were had then, but Mr. Steele reiterated that "[the Union] will go along with your suggestion."

As Mr. Allen explained for Conoco, without rebuttal by the Union, that agreement meant waiving all time limits on 72-1, proceeding to arbitrate 71-8, and after obtaining that award, agreement with the Union on how to proceed with 72-1, whether by way of another arbitration proceeding or by disposition on the basis of the award on 71-8 (T 197-98). As Mr. Allen further explained, in his call, Mr. Steele was referring to Mr. Allen's suggestion to Mr. McKendree by letter of June 8, 1972, (Dx. E, T-199-200), and *his* intent was that 72-1 would lie in a state of "moratorium" until 71-8 was arbitrated. That is the way Mr. Allen posed the question and understood both Mr. McKendree's responses (Dx. G, I) and Mr. Steele's remarks to him in July (T 197). The Union also used *Mr. Allen's* terminology in agreeing to waive the time limits on 72-1.

As understood by the Tenth Circuit in its definition of the submission, the understanding of the parties was that nothing would be done on 72-1 until 71-8 had been arbitrated. Mr. Allen and everybody else at Conoco thereafter proceeded in reliance on that understanding, and nothing else was done by the Company or the Union on 72-1 (T 201). The parties' contacts constituted an explicit agreement regarding submission of 71-8 and non-submission of 72-1 which the Tenth Circuit found. The Tenth Circuit had all that correspondence. No other discussion was had of grievance 72-1 until the Union filed its motion to consolidate on September 15, 1972 (T 102).

Waiver of time limits simply meant that the issue of timelines would not be raised by Conoco and would be shelved as an issue. That agreement was, in effect, a collateral contract binding between the parties *dehors* the labor contract

and binding on both parties. The Union had agreed to go forward *only* on grievance 71-8 and, contradicting his prior testimony, Mr. Steele admitted that Mr. Abbott told him the meaning of the parties' agreement in July, 1972, when the agreement was reached, and before Lazar was chosen as an arbitrator (T 145, 136). Those actions proved the only grievance submitted to Lazar was 71-8. When Mr. Allen returned to Billings, Montana, as he promised, he called Mr. Steele in August (T 136) and they alternatively struck names and chose an arbitrator for grievance 71-8 only, from the FMCS list (Dx. J, T 147). The Tenth Circuit so found.

In accordance with the parties' understanding, which the Union admitted, Mr. Allen wrote Lazar on August 28, 1973 advising him of his appointment on 71-8 only (T 203). Following a telephone call from Lazar, October 3, 1972, was selected for the hearing on the merits (T 204). That date was confirmed with the Union. Mr. Allen had no discussion with Lazar concerning the handling of grievance 72-1, and Mr. Steele admitted that the Union's only contact with Lazar concerned grievance 71-8 (T 147). Mr. Steele acknowledged that Conoco made the arrangement for the hearing *without objection* by him and that those arrangements related strictly to grievance 71-8 (T 149). The Tenth Circuit properly construed the extent of submission of dispute to Lazar and contrary to the Union's statement at p. 6 of its Petition, Conoco submitted only 71-8 to the arbitrator by agreement with the Union, limited his authority and if the Union had agreed or known that, it would never have filed its motion to consolidate.

It is important to realize that all the correspondence noted above (Dx. A-I), and in connection therewith, the negotiations and representations between the parties constituted the agreement which was reflected by the submission to Lazar of grievance 71-8 above (Px. 1). The Union cannot avoid the impact of the parties' agreement by disregarding that correspondence and then attempting to disparage the Tenth Circuit's examination of the record by disagreeing that the selection letter was a proper submission or that it was effective to constitute a submission of 71-8 only. An

arbitrator has no authority to consider matters the parties *affirmatively* withdraw from him since he is a creature of the parties' "common law of the shop" and not of federal statutory law. Accordingly, he had no right to impose his will from outside and did act at his peril. Lazar himself understood he had been chosen only for one grievance – 71-8 (T 68-69), and he freely admitted that he had no knowledge of any other grievance, including 72-1 or 72-2 *until* he received the Union's motion to consolidate (T 69).

As the Union's statement of chronology admits, as soon as Lazar was chosen, it disregarded its agreement with the Company and moved to consolidate. The Union neglects to mention that its motion was supported only with selected correspondence, including the grievance forms submitted by Conoco to the Union (Px. 4, 5, T 209) and carefully *selected* and slanted correspondence, including the denial of grievances 71-8, 72-1 and 72-2 by Mr. Zeien, (Px. 6), the Union's request for a partial arbitration (Px. 7) and the Union's request to the Company for consolidation based upon Mr. Zeien's denial (Px. 8). The Union deliberately and fraudulently withheld from the arbitrator all correspondence between Mr. Allen and Mr. McKendree and of which Mr. Lazar, at that time, had no knowledge. The material selected to support the motion for consolidation and the contents of the motion itself, (*see* Appendix A) was slanted by reference to selected documents and contained a clear misrepresentation of facts concerning a supposed agreement by Conoco to consolidate (T 17).

Having knowledge of the parties' prior agreement, Conoco responded by telegram to Lazar on September 15, 1972, stating that the parties had reached no agreement to consolidate (T 16) and that he had no authority to consolidate any grievance (T 18, 33-34), thus placing him on notice of his lack of authority to consolidate or proceed on 71-2 (T 18, 20, 22). Conoco was under no obligation to specify for its position reasons *ad nauseam* and in minute detail. As the Tenth Circuit properly perceived, Conoco should not have been penalized for not specifying the reasons in detail satisfactory to the Union, and Lazar acted at his peril by proceeding.

At the hearing on the motion to consolidate, the Company did not appear *solely* because Lazar lacked all authority to consolidate or proceed with consolidated grievances. Just prior to the hearing on the motion to consolidate, the Conoco attorney, Mr. William Elliott drafted a *second* telegram strenuously objecting to consolidation on the ground that Lazar lacked authority to do so (Px. 10, T 171), and he declined to appear at a *futile hearing at which the arbitrator* lacked authority and knew he lacked authority to proceed, for the reason that his appearance would have been a futility (T 173). Furthermore, Conoco was concerned, lest it abandon and waive its position by appearance and forfeit the right to raise the issue following arbitration if improper consolidation were undertaken (T 174). Since Lazar had no authority, it was proper for Mr. Elliott to refuse to appear. The Company also advised Lazar that, were consolidation ordered unlawfully and contrary to the parties' agreements, it would not appear at the hearing on the merits (T 19, 36). Despite being placed on notice, Lazar continued to conduct the hearing (T 37), refused to contact Conoco because he did not want to have "an *ex parte* one-sided type of *conversation*" and then proceeded to have an *ex parte* hearing with the attorney. Furthermore, Lazar and the Union both knew that Conoco was willing and able to arbitrate grievance 71-8 (T 181), which Conoco had, after prior notice, agreed to attend and arbitrate on October 3, 1972 (T 164).

At the hearing on the motion to consolidate, the Union again misrepresented the agreements between the parties, and Lazar chose to act upon those misrepresentations rather than contact the Company. The Union's depiction of what transpired during that hearing, at page 7 of its Petition, totally ignores the Collateral agreement of the parties and argues, in essence, that, without more, facts disclosing two overtime grievances would justify consolidation. *Without more,* that may be true, but arbitrator Lazar as admitted by the Union, examined all the exhibits "*presented to him by the Union.*" That set of documents was incomplete and ignored the agreement not to consolidate. Again, contrary to the Union's suggestion, there was no unification of these disputes at the arbitration level and the transcript at pages 100-104 and

113-116 makes clear that no unification occurred, but only joint discussion for the convenience of all parties occurred at the grievance level. From Lazar's understanding, which was premised only upon the parties' practice at the grievance level, (T 59-60), it is clear the Union misrepresented what had occurred during the handling of matters as grievances under Article IV.

Lazar conducted the hearing on the Union's motion to consolidate (Px 3) solely with the spokesman for the International Union (T 38), Mr. Dan Edwards, who "*simply read from that motion the materials in the motion and materials he verbally stated were the same, substantially, as I recall it,*" and indicated the selected correspondence. *Id.* He did not disclose the side agreement of the parties reached in the Allen-McKendree letters and Allen-Steele calls. Mr. Steele acknowledged that when the Union filed its motion to consolidate, he was not involved in preparation of that motion and that Mr. Edwards did it all (T 149-50). Mr. Steele merely attended the September 27, 1972, hearing and did not testify (T 150). Although both he and Mr. Edwards were placed under oath at the hearing by Lazar, everyone agreed that he said *nothing* (T 150). Lazar inquired of both Mr. Steele and Mr. Edwards whether there was any agreement between the Company and the Union to consolidate or dispose of both grievances. Despite obtaining from Mr. Edwards certain of the correspondence relative to the union's effort to have grievance 72-1 resolved on the basis of 71-8, Mr. Edwards was "*definite and clear that there was no agreement reached, that the correspondence which he handed to me clearly reflected the absence of any agreement*" and Lazar accepted his misrepresentations at face value (T 40). Although Mr. Edwards and Mr. Steele both were under oath at the hearing and present when that statement was made, Mr. Steele sat moot and allowed Mr. Edwards not only to misrepresent that there was no agreement concerning consolidation but also that there was no agreement pertaining to disposition of the grievances in any manner (T 41). Such silence in these circumstances was a failure also to correctly disclose information he had in discharge of his duties as a partial arbitrator.

Exhibits which formed the basis for Lazar's conclusion of a *de facto* consolidation related only to the first stage of the *grievance procedure* (T 64). By Mr. Steele's silence, the Union effectively misrepresented the existence of the collateral agreement to table 72-1. Lazar inferred that there was no agreement to consolidate when in fact, the parties had agreed *not* to consolidate, and to defer 72-1 until later (T 41). Lazar was aware of no contention concerning an agreement to defer grievance 72-1 until the decision on 71-8 had been rendered (T 56) and since he explored that possibility with Mr. Edwards by probing "in a hostile fashion," and was satisfied that no such agreement existed, the Union plainly misrepresented its deal with Conoco.

Since there is no contract prohibition regarding consolidation, Lazar concluded that "practice" under the contract allowed it, even though he chose not to determine the prior practice of the parties, and acknowledged that he did not know what it was (T 58). *He relied only on what Mr. Edwards told and reluctantly gave him* and on what Mr. Zeien said in his letter of February 17, 1972, denying both grievances together. Of course, Lazar admitted precedent for *grievance* processing *did not apply* to *arbitration* for these parties (T 64), but he relied upon it exclusively to reach his decision. He ignored Defendant's Exhibits A through I which documents the side agreement and which related solely to the arbitration process in which he was involved (T62-4). Lazar was not presented with those documents until he directly questioned Mr. Edwards, and it is unclear whether he received Exhibits A through F then or later (T 61-2). Lazar thus ignored the parties' agreement and exceeded the scope of the submission.

Mr. Steele's actions in hiding the parties' agreement was proven at trial and improperly disregarded by the United States District Court for the District of Colorado. When Lazar asked about any agreements concerning deferral or consolidation, Mr. Steele *did not* present *any* correspondence, *any* written material or *any* of the relevant letters to the arbitrator during the course of that hearing (T 151), nor did he acknowledge their oral discussions and agreement to table 72-1.

Mr. Steele then admitted that he did not orally describe to Lazar the correspondence Mr. Allen and Mr. McKendree wrote on 71-8, *only* his calls to Mr. Allen on the same subject and the agreement reached between the parties waiving the time limits on 72-1. He also failed to discuss with Lazar the status of grievance 72-1 prior to filing or hearing of the motion to consolidate, and although he, a Union arbitrator, suddenly terminated all proceedings on 72-1, he denied having any discussions in July or August with Union attorneys concerning the tabling of 72-1 pending action on 71-8 (T 152). He failed to apprise Lazar of the proposal to consider application of the decision in 71-8 to 72-1. He acknowledged that the arbitrator had to ask the Union specifically if there was other correspondence relating to the handling of grievances (T 153) since Edwards had not offered any willingly. He admitted that Mr. Edwards did not volunteer any of Exhibits A through F until he was specifically asked and was not sure what was given (T 154). Mr. Steele was aware of no other Union representative discussing the subject. Mr. Steele did not speak to Lazar then or later but still *sat silent* and concealed his information from the arbitrator.

Mr. Steele also admitted that no one was ever selected to arbitrate grievance 72-1 even though the list was dated May 23, 1972, and was received on May 25, 1972 (T 155, 154). The reason is contained in the following crucial language, "*Well, the reason it wasn't done was because there was an agreement*". He admitted receipt of a copy of plaintiff's Exhibit 1 as identified by his initials – RGS – and he did not object to that letter or file a grievance concerning the failure to consolidate 72-1 with 71-8 (T 157). At the top of page 2 of the Union's motion to consolidate (Px. 2), the Union stated that the Company had agreed to consolidate and join the two grievances. Mr. Steele specifically admitted that he had seen that language before the hearing but did not bring the misstatement to the attention of the neutral arbitrator even though he knew there was no agreement to consolidate (T 158-59). Again he admitted he did not correct the error made in the Union's motion to the neutral arbitrator (T 159), and though he tried unsuccessfully to retract it, he was *forced to admit again that there was no agreement to consolidate*

and that he knew there was no agreement to consolidate because he set up the arbitration on grievance 71-8. In sum, the Union admitted everything Conoco even contended.

Lazar concluded that no arrangement whatsoever had been made by the parties and all the foregoing evidence was ignored by the trial court.

Lazar made another error in assessing his authority to consolidate grievance 71-8 with 72-1. Lazar himself recognized that the practice *against consolidation was "both a serious matter and a matter of some long standing practice between the parties,"* (T 70), as Mr. Elliott had stated in his letter of September 15, 1972, addressed specifically to Lazar. Lazar obviously was aware of that statement and acknowledged it, stating that he gave it "considerable attention". His characterization that consolidation was serious was based upon long expertise in the field, and his observation that such matters are usually handled by collective negotiation in the collective bargaining process. Thus, they are matters of *substance, rather than procedure,* between the parties. *Id.* Lazar discussed only the mechanism of consolidation with Mr. Allen, who did not appear at either the September 27, or October 3, hearings (T-72), and he ignored substantive limitations, the merits or effect of such a decision on these parties (T 71). Nor did he consult Mr. Steele or Mr. Allen on practice of the parties. Lazar's position was that determination of the Union's motion was for the neutral arbitrator, but he admitted that Section 4 of Article V of the collective bargaining Agreement, quoted above, related only to hearings on the merits, and that the *extraordinary consolidation* hearing of September 27, 1972, presented different considerations. (T 71). In fact, Exhibit 3 refers to a "panel" and Lazar himself acknowledged that the question of his authority to proceed even at that juncture was "a bit ambiguous" (T 72). Even the district court had to agree with that (Petition, Appendix A-7).

Those statements and admissions came from a man who generally felt that consolidation was a matter of substance. While it might not have been for these parties, there was no way for Lazar to know that until he asked the questions, *and*

he failed to do that with anyone, thus ignoring the function entrusted to him by national labor policy. As a matter of substance, he proceeded without authority to consolidate. Mr. Steele specifically admitted that the question of consolidation was a serious "*substantive thing*," between these parties (T 154). In point of fact Lazar relied only on the notion that there was no express contract prohibition against consolidation. His decision that the collective bargaining agreement was practically construed by the parties to allow it was absolutely wrong, unsupported by fact and sheer speculation. He reached that conclusion because of Mr. Steele's deliberate silence when, as the Union also knew and admitted at trial, the practice was to the contrary. (*Compare* T 56 *with* T 154).

Lazar's determination plainly was based upon a misinterpretation of the two-tier grievance/arbitration procedure used by the parties. Despite the fact that this Court expects him to be more familiar with the practice of these parties, he did not inquire and even the Union's testimony was that consolidation was a "substantive" matter. On behalf of Conoco, Mr. Allen had been involved in collective negotiations for a substantial period of time (T 189, 211-12), and he testified that every article of the collective bargaining agreement was included only after substantive negotiation (T 214). The court took judicial notice that changes in the contract are made by the bargaining process, and Mr. Allen testified that the powers, duties and functions of an arbitrator are derived *solely* from the contract. *Id.* He continued, without contradiction or objection by the Union, that the only permissible shortcuts in the grievance and arbitration procedure are those which arise by agreement between the parties and there were none concerning 71-8 and 72-1, save the one respecting waiver of time limits (T 219). Mr. Allen also was aware of no provisions anywhere in the agreement dealing with consolidation of grievances and in fact there are none (Px. 15; T 220). Even though headquartered in Billings, Montana, Mr. Allen had assumed responsibility for grievances 71-8, 72-1 and 72-2 by virtue of his appointment as arbitrator (T220-22), and so he became involved in contract interpretation in that capacity. *Despite his knowledge and position as partial arbitrator,* the only discussion he had with Lazar pertained to grievance 71-8

in connection with plaintiff's Exhibit 4, which set forth the substance of the dispute, and *he was never contacted by Lazar to appear at the hearing for the Company on the motion to consolidate on September 27, 1972. That, despite his testimony that the function of the partial arbitrator is to present the neutral arbitrator with the facts necessary to assist him in reaching his decision if he has questions, and to discuss the decision in the case with him* (T 206). After appointing Lazar, his only other contact was to receive a copy of the results of the consolidation hearing (T 207-8), and Mr. Allen confirmed that no grievance for failing to consolidate was ever submitted.

On the basis of those erroneous determinations, Lazar consolidated the two grievances, (Px. 12, T 45-7) and he sent a copy to the Company advising it that a hearing scheduled on the merits for October 3, 1972, would be held on both grievances (T 48). Immediately after receiving the order of consolidation, on September 28, 1972, (T 166), Mr. Elliott responded for the Company sending a telegram to Lazar advising him that because of his illegal usurpation of authority, Conoco declined to participate in the hearing on the merits of both grievances (Px. 13). Despite having notice a third time, Lazar proceeded with the hearing on the merits on October 3, 1972 (T 49). He did not consult with the Company or Mr. Allen regarding those matters (T 73), giving as his reason and grounds the Company's refusal to participate. He did admit, however, that he never thought about calling Mr. Allen. *Id.* After conducting an illegal, *ex parte* hearing, Lazar proceeded with briefing arrangements and advised Conoco of the cut-off date (T 51-2). The Union filed a brief which was sent to the Company and Mr. Elliott again responded a fourth time by letter dated October 22, 1972, stating that the company did not intend to file a brief (T 1678), for the reason that the arbitrator violated the contract by proceeding with both. Again, even the district court thought "*the arbitrator's decision to consider grievance 72-1 is questionable*". Thereafter, Lazar's award which was the subject of the enforcement suit under §301 of the Labor Management Relations Act, was filed on November 2, 1972. The Company refused to comply with the award *solely*

because Lazar had no authority and has refused to pay for the same reason although that issue never has been before this or any other court properly.

Despite acknowledging Lazar's lack of authority, the district court improperly enforced the award by disregarding the parties' substantive collateral agreement. Furthermore it neatly avoided the question of misrepresentation by arguing that Conoco could not be permitted to frustrate the arbitral process on the basis of evidence not presented to the arbitrator, even though that was accomplished by the Union's misrepresentation and without fault by Conoco.

The Tenth Circuit properly ignored the merits of the decision, contrary to the suggestion of the Union that it was amiss by not considering his decision and considering the letter of August 28, 1972, (Px. 1, Appendix B 3), as embodying clear directions by the parties to the arbitrator of what he was to decide. The Union's pedantic insistence on the word "submission" avails them not, for the Tenth Circuit used that word as a shorthand to express its conclusion that "*this was a failure to submit grievance 72-1 to arbitration at all.*" Plainly, the Tenth Circuit was speaking in terms of the parties' agreement to withdraw jurisdiction from Lazar to consider *any* additional matter. It then properly concluded that Lazar's proceeding to hear grievance 72-1 resulted in a jurisdictional defect in that portion of the award and properly refused enforcement. Also properly, it concluded that the test enunciated in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) dealing with procedure had never been reached: Wiley reserves jurisdictional determinations to the court rather than to the arbitrator. Since the Tenth Circuit acted properly in this matter, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. The Tenth Circuit's decision below is in accord with all decisions of the United States Supreme Court denying an arbitrator authority to decide substantive matters at variance with the parties' wishes, and the court's reserving judicial review of arbitral authority to courts.

A. United States Supreme Court Cases

This court held in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that an arbitration clause in a collective bargaining agreement could be enforced under §301(a) of the National Labor Relations Act and the policy to the applied was "to promote industrial stabilization through the collective bargaining agreement." 353 U.S. at 578.

The Union argument assumes the issue in controversy as here as the beginning basis for its analysis of cases. It argues the applicability of the procedural portion of *John Wiley & Sons v. Livingston, supra,* and the inconsistency of the Tenth Circuit's decision below with it from "the fundamental labor law principle that procedural questions *which arise out of a dispute which is substantively arbitrable* are for the arbitrator and not for the court to determine." Petition, p. 12. The dispute below did *not* involve a procedural clash over consolidation in a vacuum but the judicial enforceability of a specific substantive agreement withdrawing a specific grievance – 72-1 – from arbitration. That issue, as *Wiley* and all other decisions of the court beginning with *U.S.A. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), recognize, is reserved to the court. The Tenth Circuit properly recognized and applied that precedent.

U.S.A. and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) together define the scope of judicial review of an arbitral award. In *U.S.A.*, this Court was required to construe the effect on arbitrability of a vaguely worded exclusion clause "precluding arbitration of anything which was 'strictly a function of management' ", 363 U.S. at 566. Its interpretation was confined to the collective bargaining agreement. Upholding the primacy of the parties' *agreements* regarding arbitration – in this case – the written labor contract, the court said:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of

> cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant." 363 U.S. at 578-9.

Here, it was a side agreement withholding 72-1 from arbitration which defined "the rights and duties of the parties . . ." and which the Tenth Circuit properly upheld under the teaching of *U.S.A.* It also recognized that "[g]aps may be left to be filled in by reference *to the practices* of the particular industry and of the various shops covered by the agreement." 363 U.S. at 580. Thus, while a collective bargaining agreement may be likened to a constitution, unwritten practices and other agreements framed by correspondence flesh it out in the manner of statutes and as long as they remain congruent with the contract, they must be accorded equal dignity. *U.S.A.* is an exposition of that analogy. The matters it treats are those entrusted to the court.

Having stated that philosophy, the court announced the following rule:

> "The labor arbitrator's source of law is *not confined to the express provisions of the contract as the industrial common law the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.*" 363 U.S. at 581 (emphasis added).

*See also n.*7: "[T]he question of arbitrability is for the courts to decide; *cf., U.S. v. Testan,* 44 U.S.L.W. 4245 (U.S.S.Ct. March 2, 1976) (announcing rule that any tribunal must have jurisdiction to proceed).

Because the exclusion clause was vague, the arbitration clause broad and the evidence of intent to exclude the particular grievance from arbitration utterly lacking, this Court found in *U.S.A.* the dispute subject to arbitration. As to evidence, it did note that the collective bargaining agreement itself, "*[o]r a written collateral agreement may make clear that [the dispute] was not a matter for arbitration.*" 363 U.S. at 584 (emphasis added).

As if that exposition in favor of enforcement of the parties' substantive agreements was not enough, in *Atkinson,* this Court observed:

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties." 370 U.S. at 241.

Next, in *John Wiley & Sons, Inc. v. Livingston, supra,* this Court agreed in passing with that rule *before* reaching the primary issue there posed:

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori,* it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." 376 U.S. at 547.

Contrary to the Union's statements, neither *Wiley* nor the Tenth Circuit case of *United Auto Workers v. Folding Carrier Corp.,* 422 F.2d 47 (10th Cir. 1970) addressed that issue. *Wiley* disposed of the threshold issue by noting that 1) the dispute was not substantively excluded by specific exceptions to the coverage of the grievance procedure; 2) the arbitration procedure was the "sole and exclusive remedy of the parties;" 376 U.S. at 553; and 3) there was no evidence of exclusion by any other process. Accordingly, the Court stated:

> "It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction. See *Warrior & Gulf, supra,* 363 U.S. at 582, 583."

That Court then addressed the question of "procedural" aspects, *i.e.*, "whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate. . .," 376 U.S. at 557, and decided whether to entrust that determination to the court or the arbitrator. It chose the latter *solely* because consideration of procedure invariably requires consideration "of the merits of the dispute." *Id.* Its major concern – "delay" does not apply in situations such as the present after the award has been entered. Being careful to emphasize the extent of its decision, the Court concluded:

> *"Refusal to order arbitration of subjects which the parties have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted."* 376 U.S. at 558-9 (emphasis added).

Operating Engineers v. Flair Builders, 406 U.S. 487, (1972) adds nothing, for, contrary to the position of Conoco here, both "*parties did in fact agree to arbitrate the issue of laches. . .*" That conclusion was based upon an arbitration clause that embraced "any difference" and a record which disclosed no exception or exclusion. That is far different from the present record. That case reiterated the important distinction between determining arbitrability and thereafter deferring to the arbitrator:

> "Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the *scope of the arbitration clause, remains a matter for judicial decision."* 406 U.S. at 491 (emphasis added).

In place of "arbitration clause," easily can one read the words "submission" agreement: Thus the Union's reliance on cases cited in its Petition at page 14 is misplaced. The issues decided there are different from the arbitrability dispute here.

Thus, the labor policy of the United States is not to enforce arbitration of all issues in a blind and heavy handed manner merely because a collective bargaining agreement contains a broad arbitration clause, but to foster the settlement of industrial disputes through arbitration by enhancing its prestige and building confidence in it by compelling parties to submit to arbitration *only* what they agree in advance. As this Court has made clear, parties are under no obligation to submit anything to an arbitrator and cannot be compelled to do so since it is *their* industrial law which is being adjudicated.

The issue here involved whether a collateral agreement withdrawing 72-1 from arbitration existed. Once found to exist, as a substantive matter, of industrial law, it decreed as non-arbitrable *together* 72-1 and 71-8. They *were not* substantively arbitrable – the very issue of the case – as the Union asserts in its Petition at page 12. Consequently the cases it cites at page 13 are inapposite as they involve disputes the parties agreed were arbitrable or disagreements as to how to conduct the arbitration hearing. The Union's argument is intellectually dishonest at pages 13-14 since it confines its analysis to the collective bargaining agreement and lack of exclusionary language therein without considering or facing the evidence of the collateral agreement, past practice and fraud. Hence, consolidation was *not* an issue for determination by Lazar because the parties already had decided it. That is *the* correct teaching of *U.S.A., Atkinson, Flair* and *Wiley* since consolidation of two specific grievances here was, by agreement, non-arbitrable between Conoco and the Union. Nothing was left to the arbitrator to decide, and contrary to the Union's misrepresentations now, no one ever considered it "procedural" but always "serious" (T 34, 70) and a "substantive thing" (T 154). Parenthetically, this case has nothing to do with examination of the merits of arbitral decisions and the Union's monotonous string of citations at page 14 applauding judicial deference in that arena are meaningless. All well-reasoned federal decisions recognize and uphold those distinctions.

B. Decisions of Lower Federal Court

Many courts have held that they are obliged to determine what issues an employer must arbitrate as well as the authority of the arbitrator to hear any particular matter anytime an arbitration award is contested. *E.g., IUE, Local 616 v. Byrd Plastics, Inc.*, 428 F.2d 23 (3rd Cir. 1970); *HREU v. Las Vegas Hacienda, Inc.*, 383 F.2d 667 (9th Cir. 1967); *cert. denied*, 390 U.S. 958 (1968):

> "But the mere presence of an arbitration clause in a collective bargaining agreement does not necessarily trigger resorting to arbitration. Since arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute that he has not agreed to have arbitrated. *United Steelworkers of America v. Warrior and Gulf Navigation Company, supra*, 582. It is the Court's duty to determine whether the parties have agreed by contract to arbitrate the disputes in question. *International Union of Operating Engineers, Local 150 AFL-CIO v. Flair Builders, Inc.*, 406 U.S. 487, 491, 2441 (1972); *Atkinson v. Sinclair Refining Company*,. . . See also *John Wiley & Sons, Inc. v. Livingston*, . . . *Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254, 50 LRRM 2440 (1962); *Laundry, Dry Cleaning and Dye House Workers . . . International Union, Local 93 v. Mahoney*, 'No. 72-1731, at 5, 85 LRRM 2280 (8th Cir. Jan. 22, 1974); *Local 1416, International Association of Machinists v. Jostens, Inc.*, 250 F.Supp. 496, 500 (D.Minn. 1966).
>
> From the contractual basis of arbitration it follows that arbitration cannot be compelled unless a valid contract exists. It has been said that the existence of such agreement at the time that the claimed grievances arose is a threshold question of law for the Court to decide. *Local Union No. 988, Etc. vs. B. & T. Metals Company*, 315 F.2d 432, 436, 52 LRRM 2787 (6th Cir. 1963); *United Mine Workers of America, District 22 v. Ronceo*, 314 F.2d 186, 188, 52 LRRM 2578 (10th Cir. 1963) 85 LRRM at 2724."

Thus, what was submitted to the arbitrator had to be determined by and was binding on him and on the court: *It was only 71-8* (Px. 1). That answer fully determines that arbitrator Lazar exceeded his authority on 72-1 by consolidating both. In light of the wishes of the parties, their actions and custom and past practice under their collective bargaining agreement, it is plain that only 71-8 was submitted to the arbitrator. He retained authority to consider no other matter. Arbitrability is akin to subject matter jurisdiction of a federal court and is based upon notions of substantive due process.

The same precepts of due process apply without attenuation in the arena of arbitral combat. It is *industrial due process* there, but the mandates are the same. *John Wiley & Sons v. Livingston, supra.* Jurisdiction is subsumed in the question of arbitrability. Since Lazar lacked jurisdiction by non-submission, any action he took was immaterial. Whether or not the defense of jurisdiction was raised before him – and it was raised explicitly by Mr. Elliott's letter of September 15, 1972, (Px 9) – is not important, for *a priori, all* of his succeeding acts, including his finding of jurisdiction and order of consolidation, were void since he didn't have jurisdiction. Nor did possible failure to raise the question at the hearing before the arbitrator work to prevent the defendant from raising the question later: arbitral jurisdiction cannot be acquired *ex parte* by consent, waiver or estoppel. *E.g., Mahoney v. Northwestern Bell Telephone Co.*, 377 F.2d 549 (8th Circ. 1967); *Tribelhorn v. Turzanski*, 370 P.2d 757, 149 Colo. 448 (1962). Lazar had the power to inquire into jurisdiction to determine his right to proceed but that restricted right *did not*, mean that his determination of jurisdiction foreclosed Conoco from later raising the issue. Neither a court nor an arbitrator can extend their own "power" just by saying they have it. Jurisdiction exists or it does not. If a court or an arbitrator decides improperly, his later actions are simply void – no *de facto imprimatur* of due process legality is acquired merely by acting. *See U.S. v. Testan, supra.* One also must have the objective and demonstrable right to act. Once Conoco objected to the arbitrability and consolidation of grievances 71-8 and 72-1 on the grounds

that the parties determined it to be a matter of substance and stated that the right and power to proceed was conferred by the collective bargaining agreement, the arbitrator objectively was without authority to proceed further.

Lazar's lack of authority and jurisdiction properly was laid before the trial court for determination. *Sperry Rand Corp. v. Engineers Union (IUE),* 371 F.Supp. 198 (D.C. S.D.N.Y. 1974), concerned an action brought by the company to prevent arbitration of certain grievances. The court stated:

> It is the responsibility of the *court* to determine whether the parties are bound to arbitrate and, if so, what issues . . . [This view rejects (the union's)] suggestion that the issue of arbitrability is for the arbitrator .... Absent a clear provision in the collective bargaining agreement requiring otherwise, the decision is for the court. 371 F.Supp. at 202 (emphasis in original and citation omitted).

The question addressed by the court is the same, if the stage of the proceeding is not. Although this was not a proceeding to compel or prevent arbitration, but rather to enforce an arbitration award, the question of arbitrability still was before the court. In *District 65 v. Surgical Supply Co.,* 283 A.2d 766, (D. N.J. 1971), the opponent of arbitration took the position that there was no arbitrable dispute and did not participate in the arbitration proceedings although he received due notice thereof. Although the court stated it could be subject to the award without participation, it continued:

> *The foregoing does not mean that such a defendant waives his right to a judicial determination that he was under no contractual obligation to arbitrate. He may raise that issue in defense of an application by the demandant for entry of judgment on the award.* 283 A.2d at 767 (emphasis added).

See also, UTWA, Local 179 v. Western Co., 86 LRRM 2039, (E.D. Mo. 1974), a suit by the union brought to enforce an arbitration award, in which the employer contended the

arbitrator had exceeded his jurisdiction and authority. The court said:

> "Both parties here agree that the courts do not have jurisdiction to review the merits of the underlying dispute... The only point for us to decide is whether the arbitrator had authority to grant the awards in question." 86 LRRM at 2042.

Furthermore, even if no objection otherwise could be raised, the collective bargaining agreement between the parties requires submission of materials to a panel of arbitrators. That was not done on either 71-8 or 72-1. Lazar alone (T 72-73) issued the consolidation order, Exhibit 12 (Px. 306) despite his admission (T 72) and the district court's finding that his authority was "a bit ambiguous". *Accord, IAM, District No. 145 v. Modernaire Transport Inc.,* 86 LRRM 2886 (5th Cir. June 20, 1974), holding that arbitrator exceeded his jurisdiction by interpreting work in collective bargaining agreement contrary to their expressed meaning but enforcing award on other grounds; *Teachers' Association v. Board of Education,* 87 LRRM 2191 (N.Y. Sup.Ct. 1973) (award overlapping school terms void as in excess of express jurisdiction of arbitrator and vacated); *Local 379 v. Creme Cone Mfg. Co.,* 87 LRRM 2077 (Ohio Common Pleas, 1974) (arbitrable ruling finding certain job titles to be not bargained held contrary to the express language of the applicable collective bargaining agreement and void as a modification by arbitral interpretation, of the contract where that contract precluded such modification); *Timpken Co. v. USA Local 1123,* 482 F.2d 1012 (6th Cir. 1973) (award void where arbitrator exceeds jurisdiction); *SCME, Local 1518 v. Sinclair Cty. Bd. of Commr's,* 82 LRRM 2927 (Mich. App. 1972) (arbitrator exceeded his authority by improperly construing collective bargaining agreement and award based thereon void); *USA v. General Fireproofing Co.,* 80 LRRM 3113 (6th Cir. 1972) (arbitrator exceeded his jurisdiction by improperly categorizing certain supervisors as employees and award rendered thereon void); *Belardineilli v. Werner Continental, Inc.,* 318 A.2d 777 (N.J. Sup.Ct. 1974) (arbitrator who added noncontractual grounds for termination of employees to the contract and upheld their

discharge on that basis exceeded his authority under the agreement and award rendered thereon held void and vacated.) In *MCBW Local 195 v. Cross Brothers*, 362 F.Supp. 127 (E.D. Pa. 1973), the court denied an employer's motion for judgment on the pleadings where the submission had been to a single arbitrator rather than a panel of three members as required by the collective bargaining agreement. The court held:

> "This could not be done under the agreement unless the local consented to it or waived its right to object. According to the pleadings, there is a factual issue whether it did agree or waive its right. If it did neither, a single arbitrator had no authority to resolve the grievance." 362 F. Supp. at 129.

Since Conoco did not waive its objection, Lazar lacked authority to proceed without panel authorization. The Tenth Circuit cases are in complete accord.

C. The Law in the Tenth Circuit

The union first relies on a misconstruction of *UAW v. Folding Carrier Corp., supra*. The court there construed language stating "any dispute was subject to arbitration" *in the absence of any evidence of an exclusion or agreement not to arbitrate* as obligating enforcement of the award. It consented in the collective bargaining agreement. However, in the course of its opinion, the court stated:

> "The courts have distinguished between substantive and procedural arbitrability. The former is concerned with whether the dispute relates to a subject matter which the parties have contractually agreed to submit to arbitration. *This question is to be decided by the courts because no party has to arbitrate an issue unless he has consented. Atkinson v. Sinclair Refining Co.*, 270 U.S. 238, 241, 82 S.Cr. 1318, 8 L.Ed.2d 462, and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409, 422 F.2d at 49." (emphasis added)

Because of the employer's consent, that case is inapposite here.

The case which does deal properly with the scope of arbitrability and the duty of a court to enforce the parties agreements is *Local 782 v. Sav-On Groceries*, 508 F.2d 500 (10th Cir. 1975).

That case has set out the law applicable in the Tenth Circuit concerning the authority of an arbitrator and the source of his authority, and it is fully consistent with all United States Supreme Court decisions discussed above. There, the trial court refused to enforce an arbitration award in favor of the Union. An employee holding the job title classification "Clerk" (which required her to do both checking and stocking work) had her hours reduced during 1971 and 1972, allegedly in violation of an existing labor contract while other employees with less seniority did not. A grievance was filed and the following issue was submitted to the arbitrator:

> "Did the company exercise fairness in judging the qualifications of Donna Whiles by not allowing her to displace less senior employees who engaged in stocking and checking duties." 508 F.2d at 501.

Besides deciding in favor of the grievant, the arbitrator awarded back pay and stated that the employer could not assign her "impossibily" heavy tasks in order to reduce her hours or eliminate her altogether. The employer failed to comply with the order by paying back wages, and on January 2, 1973, discharged the grievant. *Sav-On* defended on the ground that the issue of back wages and assignment of heavy tasks had not been submitted to the arbitrator and that, therefore, he was without jurisdiction to make such an award. The trial court held the award null and void on both counts but remanded the parties to arbitration on the issue of back pay and the discharge of January 2. The union appealed.

Rejecting the union's contention, the court stated unequivocably:

The trial judge did not question the merits of this award, i.e., whether Sav-on had in fact acted fairly in dealing with Mrs. Whiles, but rather only whether the arbitrator had authority (in light of the issue presented for arbitration) to make an award of back pay. The authorities cited by union in this regard are inapposite. 508 F.2d at 502.

Regarding a second issue, the court noted that "Sav-on's challenge to the arbitrator's award is here premised upon the fact that the issue submitted to the arbitrator was a narrow one which did not encompass the back pay remedy awarded." The court had previously summarized the applicable laws as follows:

> "Union's primary contention is that the arbitrator has authority to grant back pay to the grievant, Mrs. Whiles, even though the precise issue submitted (as set out above) did not ask the arbitrator to formulate such a specific remedy.
>
> While we take note that there is some authority to the contrary, we hold the better rule is:
>
> In granting the Company summary judgment, the trial court merely declined to enforce so much of the arbitrator's award as related to back pay, and did so without prejudice to further arbitration proceedings to resolve that issue. While it may be doubted that the question was or is of sufficient importance to justify reviving or prolonging any part of the dispute between the parties, it is true, as the trial court said, that the back pay issue was not specifically or necessarily included in the subject matter submitted to arbitration.
>
> It is the law that 'arbitration is a matter of contract and a *party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.*' " *Id.* (Emphasis added and citation omitted.)

The court stated that there was no question that what was submitted to the arbitrator was in any sense "vague". It also rejected the union's reliance upon language in *USA v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), that the arbitrator is to bring his informed judgment to bear upon solving the problem, as indicating that the arbitrator has "inherent" power to formulate a remedy despite the scope of the issue presented by the parties. The court pointed to the following language in *Enterprise Wheel* as precluding such an inference:

> Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas *marked out for his consideration.* It is not apparent that he went beyond the submission. *Id.* (emphasis added).

The court concluded "that in the case at bar, we think that the arbitrator clearly went beyond that area marked out for his consideration," 508 F.2d at 503, and it held "that the trial court did not err in finding that the arbitration award was null and void insofar as it applied to that issue." *Id. See also IAM District No. 145 v. Modernaire Transport, Inc., supra.* Even Judge Doyle, in his dissent, did not quarrel with the principle relied upon by the majority. He stated that "*the question is not whether the arbitrator has the authority to decide issues which have not been properly submitted to him by the parties. Obviously, he does not have.*" 508 F.2d at 504. *Accord., OCAW, Local 2-124 v. American Oil Co.*, 91 LRRM 2203 (Jan. 15, 1976).

That case was *totally* dispositive of the one now before the court and was relied upon by the Tenth Circuit since the arbitrator chose to proceed in the absence of authority to consolidate despite the express wishes of the parties. Under *Local 782 v. Sav-on,* his action was null and void, and the trial court here improperly decided he had authority to act as the Tenth Circuit found. The Union attempts to distinguish *Sav-on* by asserting no "submission" existed here. Semantics be damned! The parties agreed *not* to consolidate any grievances and *not* to allow Lazar to decide 72-1. Through trick,

fraud and artifice, the Union renounced that agreement. No fraud was present in *Sav-on*, but otherwise, the cases are identical in that the evidence established the agreed-upon bounds of submission. Lack of "surprise" over an issue is not a test recognized by any case as defining arbitrability, and Lazar most clearly swept beyond the bounds "marked out for his consideration" – not, it is true, by the collective bargaining agreement, but surely by the parties' collateral agreement, which as *Wiley* recognized is competent to define arbitrability. That was proven and found here by the Tenth Circuit and its decision comports both with *Sav-on* and with all prior decisions of this court.

The Union is wrong when it says all overtime grievances were submitted to Lazar by Allen. (*See* Px. 1.) 72-2 was never mentioned. *U.S.A. v. U.S. Gypsum Co.*, 492 F.2d 713 (5th Cir. 1974) is inapposite since it deals with the interpretation of the breadth of issues the parties have *agreed* to arbitrate – akin to *Operating Engineers* – and not the situation where there was no submission at all.

It is undisputed that no arbitrator was picked for grievance 72-1. Mr. Steele, the union arbitrator for both grievances admitted that he did not even know what happened to grievance 72-1 (T 152-3). The FMCS arbitration list for 72-1 (Dx. N) was never used; consequently, it cannot be contended that an arbitrator for grievance 72-1 ever was selected. The parties agreed not to proceed on it. Subsection 3 of Article V of the collective bargaining agreement requires that the parties "*shall*" select the neutral arbitrator. That procedure was not followed. In *IAM, District Lodge 67 v. Trailways Service, Inc.* 80 LRRM 2163 (D.D.C. 1972), the union moved for summary judgment to require an employer to submit to arbitration the discharge of an employee under an arbitration procedure similar to that used here. The union claimed that the employer had agreed to a certain arbitrator and the employee maintained that it had not, contending that the selection of the arbitrator must take place pursuant to the standard arbitration procedure. The court denied the union's motion, saying

> ". . . [the employer's] affidavit raises two genuine issues of material facts. The first issue is whether [the agent of the employer] agreed with the union to have Strong arbitrate the Byrd discharge. The second issue is whether he was authorized to deviate from the terms of the [collective bargaining] agreement even if he had agreed that Strong should be arbitrator. This conclusion is not negated by the fact that in May of 1971, [an agent for the union] and [the agent for the employer] agreed that Strong should arbitrate a grievance arising out of certain regulations promulgated by the employer [which was a distinct grievance.] 88 LRRM at 2204.

Addressing the second issue, the court stated that the authority of an agent to bind the employer was not foreclosed by the determination of the arbitrator and must be tried by the court. Here the evidence was that no arbitrator was selected by the parties and self-selection does not exist. As Mr. Allen testified, there were no provisions relating to consolidation (T 220), and no shortcuts in handling were agreed-upon between the parties here (T 219), save the agreement to waive time limits on grievance 72-1 and to table disposition of the grievance pending the award on 71-8. That was undisputed and uncontradicted. For present purposes, it is crucial to note that the grievance procedure was not followed, and in such circumstances, courts uniformly have refused to enforce the arbitration award ultimately rendered.

For example, in *IBEW, Local 368 v. Western Electric Co., Inc.* 83 LRRM 2422 (D. N.J. 1973), the court vacated an award, holding that the employer could not be compelled to arbitrate because the union had failed to comply with procedural time limits specified in the grievance and arbitration clause. Likewise, in *Sam Kane Packing Co. v. Meat Packers,* 83 LRRM 229 (5th Cir. 1973), an arbitration award issued by one of three required arbitrators, without specific waiver by the parties, was found void and unenforceable. In *Bethlehem Mines Corp. v. UMW,* 494 F.2d 726 (3rd Cir. 1974), the court concluded that an employer was not obligated to submit any issue to an arbitrator who had not been chosen to arbitrate the dispute in the absence of an agreement picking him as

permanent umpire, in view of the fact that written notice of intent to decline his use had been given and in light of the custom and practice of the parties. A case that went even further was *Garlick Funeral Homes v. SEIU Local 100,* 85 LRRM 2749 (E.D. N.Y. 1974), which held that an employer was entitled to an injunction personally against an arbitrator to preclude him from being chosen and proceeding with an arbitration in the absence of an agreement indicating that he had been chosen to arbitrate a dispute by mutual agreement of both parties.

In each of the foregoing cases, the court undertook to examine and inquire after the *authority* of the arbitrator to proceed and cast a critical eye over the collective bargaining and collateral agreements of the parties before reaching the conclusion that the arbitrator had, in fact, failed to comply with the wishes of the party by arbitrating the issue they placed before him. Those cases indicate that the law gives short shrift to an arbitrator who walks in, takes over a dispute and tampers with the fragile thread of industrial harmony built painstakingly by the parties, by deciding what he will and will not do, on his own terms and *regardless of the contrary wishes of the parties.* Lazar acted like an officious intermeddler, and it is that kind of conduct and overreaching that the courts uniformly have declined to enforce. It certainly did not "draw its essence" from the collective bargaining agreement as defined by the parties' practice and from the collateral agreement as required by *U.S.A. v. Enterprise Wheel and Car Corp., supra.* For the same reason that none of the foregoing courts thought their authority to inquire into the arbitrator's right to proceed was foreclosed on the grounds his selection was "procedural", Lazar's selection, or rather non-selection on grievance 72-1, authorized court review of the premises.

The Tenth Circuit's decision rested upon uncontradicted evidence that: 1) no arbitrator was even chosen on grievance 72-1; 2) Lazar was chosen only to arbitrate grievance 71-8 (a fact which he freely admitted himself); 3) there was no agreement concerning consolidation of the two grievances before Lazar or any agreement waiving the selection of an arbitrator; and 4) the parties agreed *not* to consolidate 72-1 with 71-8 or submit the former to

arbitration. In those circumstances, *Local 782 v. Save-on Groceries,* mandated reversal. This Court should decline to review further.

D. Review of Arbitral Authority

Moreover, review by the court of the authority of the arbitrator to consider a matter or make a decision is not a review of his decision on the merits. *UTWA, Local 179 v. Western Co., supra* at 2042. The decision on jurisdiction must turn to some extent on the interpretation of the collective bargaining or side agreement which confers jurisdiction. To say that the arbitrator's decision on his jurisdiction is not reviewable, in conjunction with a rule that the court defer to the arbitrator on the merits, would effectively preclude *all* judicial review of an arbitrator's rulings for any reason. The court in *Pacific Northwest Bell Tel. Co. v. CWA,* 310 F.2d 244 (9th Cir. 1962) considered exactly such an argument – that introduction of evidence of bargaining history went to the merits of the underlying dispute between the parties and the arbitrability of the dispute. The court rejected that contention stating:

> "There can be little doubt that in ... the case at bar a determination upon the merits will affect the question of arbitrability and vice versa. But we do not apprehend that this almost inevitable interlocking of issues results in ousting the courts from any inquiry beyond the bare written words themselves.
>
> The question, as we view it, is simply whether judicial construction of the arbitrability clause would require that the underlying dispute be first resolved in order to determine whether it is subject to arbitration.
>
> In the case before us the underlying dispute is as to the company's right to resort as it did to disciplinary suspension.
>
> Let us suppose (reverting to appellant's first contention) that the rationale of appellant is as follows: 1) the

arbitration agreement is limited to the provisions of the contract; 2) bargaining history demonstrates the understanding of the parties that the company may resort to such discipline and the union has been unsuccessful in its effort to secure a contract provision to the contrary; 3) therefore, such disputes are not within the "provisions" of the contract and therefore are not subject to arbitration.

Clearly, under such rationale, the reaching of *its* question by the court requires a preliminary examination into the *arbitrator's* area and a determination in that area. . . (emphasis in original).

Thus, *before* the court could find that the dispute was excluded from arbitration, it was necessary to determine whether the company had retained this disputed right as a function of management: the merits of the underlying dispute itself. 310 F.2d at 248-249. (Emphasis added.)

The appeals court there remanded the case to the district court for a consideration of the bargaining history to determine the issue of jurisdiction of the arbitrator. The trial court here ignored it.

In *ICW v. Imoco Container Co.*, 78 LRRM 2014 (S.D. Ind. 1971), the parties *mutually agreed* to submit the question of consolidation of grievances to arbitration. Here, it was lack of authority derived from a mutual submission coupled with the arbitrator's insistence on proceeding, despite an agreement *not* to proceed, which gave rise to the jurisdictional infirmity. Consolidation was not an arbitrable issue procedurally because past history generally, and a specific contrary agreement on 71-8 and 72-1, particularly, precluded it. The arbitrator's decision on that jurisdictional question properly was reviewed by the trial court, but it had to disregard clear, contradicted evidence to enforce his award. *See also, Local 719, BCW v. National Biscuit Co.*, 378 F.2d 918 (3rd Cir. 1966).

Conoco carried its burden by showing that it *never* acquiesced in the jurisdiction of the arbitrator then, or at any time in the past, to consolidate or hear multiple grievances and that Lazar disregarded the evidence.

In sum, although many courts have stated that they will be wary of rejecting the arbitrator's interpretation of custom and past practice, a court will *not* stay its hand and the arbitrator's decision that he has authority will not be accepted where his authority is purportedly derived from sources outside the agreement or reached in disregard of the agreement. The authority of the arbitrator or lack of authority to render the specific award is always "subject to meaningful review" by a court in an action to vacate the award. See *Torrington Co. v. UAW, supra.* Moreover, an award *always* may be vacated on the grounds that the arbitrator's decision as to the scope of the submission by the parties violated the contract or his decision exceeded the scope of the submission. *MCBW, Local 56 v. Great Atlantic and Pacific Tea Co.*, 415 F.2d 185 (3rd Cir. 1969). Here there was a refusal which precluded the arbitrator from acting, and he should have taken the hint!

E. Enforceability of the Side Agreement Under the Collective Bargaining Agreement

The agreement to table grievance 72-1 until final resolution of 71-8 had to be examined *with* the collective bargaining agreement and was equally binding to Lazar. He had *no jurisdiction or authority* to disregard that agreement and proceed with 72-1, and his award may not be enforced because the parties' later agreement withdrew from him any jurisdiction to even entertain the question of consolidation., *E.g., Sperry Rand Corp. v. IUE, supra,* (issue of arbitrability as modified by a letter memorandum agreement between the parties precluding arbitration is for determination by the court and not the arbitrator); *OCAW Local 7-210 v. American Maize Products Co.*, 86 LRRM 2435 (N.D. Ind. 1972), *U.S.A. v. Warrior and Gulf Nav. Co., supra.* Once the agreement to table is reached between the parties. Lazar no longer could ignore it or hear argument to modify its terms. He was bound

to consider only grievance 71-8 because the parties agreed that was all he could hear. Once he disregarded that contractual mandate, he exceeded his authority and voided his award.

Conoco did not have to assert the agreement not to consolidate at the hearing before the arbitrator as interpretation of that agreement was beyond the scope of his authority. The Arbitration Procedure (Article V, §5a) limits the availability of arbitration to:

> a. Grievances arising between the Union and the Company relating only to the interpretation of performance of *this agreement* which cannot be adjusted by mutual agreement.

This side agreement further circumscribed the scope of the arbitration *instanter*. Under one valid view of the matter, the side agreement to table and not to consolidate was an agreement collateral to the Articles of Agreement, and a bargained shortcut between the parties of that agreement which had nothing do with the terms of the collective bargaining agreement. rested on distinct interpretations of offer, acceptance and consideration derived from communications outside the agreement. Since the arbitrator was limited in his authority to interpreting the terms of the Articles, he had no authority to determine the validity or effect of this outside agreement, especially since it related to limitations on his ability to proceed. In *MEBA Dist. 2 v. Falcon Carriers, Inc.*, 86 LRRM 2121, (S.D. N.Y. 1974), the district court applied this concept in a suit for a stay of arbitration concerning such an "outside agreement". The contract contained language similar to that here. In reference to another side agreement, in that case to arbitrate a dispute, the court said:

> "The alleged '*side agreement*' is, at best, a separate contractual undertaking between the parties and any dispute concerning its existence and effect *cannot be said to be 'relating to or involving the interpretation, construction, application or performance of any of the terms and conditions of' the collective bargaining agreements.*

> For this reason, the court can *state with "positive assurance"* that this dispute is not covered by the arbitration clause of the collective bargaining agreement. As was stated by Judge Cooper in *Cook v. Gristede Bros.* [359 F.Supp. 906 (S.D. N.Y. 1973)]:
>
> > To extend by implication a limited and specific agreement to arbitrate ... would be to recklessly misconstrue and torture the clear import of the agreement and rewrite its terms. *While there is no express provision excluding this particular grievance ... from the arbitral process, the fact the parties in unambiguous fashion have expressed their intent by making specific provision for arbitration applicable only in a clearly defined area is evidence sufficiently forceful to declare their purpose to exclude other grievances therefrom.* A matter is to be excluded then it is foreign to, and not limited within the language of the agreement limiting arbitration to a particular type of dispute. 86 LRRM at 2124-25 (emphasis added).

A "side agreement" is given that status because *U.S.A.* gives the parties – and not the Congress – the power to define "the common law of the[ir] shop."

Assuming *arguendo* that the agreement not to consolidate even was arbitrable under the collective bargaining agreement, the question of this particular agreement was never submitted to arbitration. There was no grievance filed with respect to that agreement (T 177, 208) nor any showing that the dispute could not be settled by mutual agreement, as provided in Article V, §5(a) and (b), nor had there been any decision rendered concerning the dispute pursuant to Article IV, §2(c) as required by Article V, §(1).

Lazar failed in his task because he failed to appreciate the significance of those limitations in the collective bargaining agreement or to determine or consider the past practice of the parties in defining and interpreting the collateral agreement – even though it was uncontradicted that its terms

precluded consolidation of two grievances and that no authority to do so had been ceded to the arbitrator by Conoco or the Union in the collective bargaining agreement. Even more importantly, Lazar failed to ascertain the meaning of the phrase, "waive the time limits" as contained in the parties' side agreement. In fact, by *all* the evidence, he did it incorrectly.

Indeed, as the court in *Electronics Corp. v. IUE, Local 272,* 492 F.2d 1255 (1st Cir. 1974), held, where the arbitrator misinterprets and misunderstands the facts, or the state of facts relied upon in reaching an award are erroneous regardless of his fault, the award violates due process and must be vacated. *Accord, Belardinelli v. Werner Continental, Inc.,* 318 A.2d 777 (N.J. Sup.Ct. App.Div. April 4, 1974); *Local 379 v. Creme Cone Mfg. Co., supra.* Since Lazar failed to obtain the facts indicating that the parties had agreed on a method of processing grievance 72-1, his insistence upon proceeding with both was totally without force and effect.

From the foregoing, it is clear that the Tenth Circuit determination here precisely tracked the intent and rulings of prior cases by upholding the primacy of any arbitrator's decision and defining to it *only* after the court has determined that the dispute is arbitrable. However, this case neither raised nor inferred any new issue not decided by this Court previously or followed by the Tenth Circuit in *Sav-on.* The particular facts of this case presaged the result reached and, hence, its limited local significance militates against extended consideration by this Court.

II. This decision did not conflict with any decision of the Eighth or other circuit which deals with procedural aspects of consolidating grievances.

As noted, *John Wiley & Sons v. Livingston, supra,* established that *once* substantive arbitrability is established or conceded, the procedure for carrying that matter through arbitration is for the arbitrator to decide. Matters of substance, *as consolidation here,* are judged by the *court* under the standard established in *U.S.A. v. Warrior & Gulf Nav. Co.,*

supra, which requires a reviewing court to enter an order finding the matter arbitrable if the court cannot say with "positive assurance" that the matter is excluded from coverage. 363 U.S. at 574. That language embodies the test for judging an exclusionary clause. *John Wiley & Sons v. Livingston, supra,* did not concern that point, but held that that threshold issue is resolved, then procedural mechanics of conducting the arbitration are not open to court review. *Wiley* also determined that courts must defer to the arbitrator's determination of what is substance and procedure *when they are so factually intermingled* with the merits that it is impossible to separate the two. The reason is the procedure cannot be defined with precision, but depends rather upon the facts and the parties' interpretation of those facts. 376 U.S. at 556-7. The cases are in total agreement that if the matter is one of substance and *substance includes exclusionary clauses or agreements,* it is proper for court review. *See Local 719, BCW v. National Biscuit Co., supra,* which considered an exclusionary clause proper for review and a proper basis to avoid enforcement of an arbitral award. Then the court must determine whether arbitration had been conducted in accordance with the authority conferred upon the arbitrator by the parties' contract, submission agreement, side agreement or prior practice under the contract. Lazar ignored all but the first (T 58), even though it is silent on consolidation (T 219-20). The parties determine the private law that governs the dispute and confers upon the arbitrator power. For these parties, consolidation was "a serious substantive" matter subject to negotiation. The Tenth Circuit made a correct determination.

Thus, while the subject matter of 71-8 and 72-1 is arbitrable, that is immaterial, for what matters is *how* these parties characterized consolidation between themselves. *Wiley* holds that the procedure which cloaks the arbitrator with absolute discretion must be derived from the collective bargaining contract or other agreement between the parties and concludes that it depends upon the facts and practice of the particular parties. There is no labor policy which precludes inquiry into unauthorized or fraudulent arbitration, and *72-2* was settled by these parties long ago. The issue raised is

substantive arbitrability when an arbitrator proceeds in derogation and defiance of an existing agreement between the parties. *Wiley* and *National Biscuit Co.* reserve that matter to the courts because the interests of fair play outweigh possible delay. Furthermore, had the Union been concerned about delay, it should have sought summary judgment rather than contend by ambush, surprise and trick.

The Union chooses to rely upon a string of inapposite authorities headed by *Avon Products, Inc. v. UAW*, 386 F.2d 651 (8th Cir. 1967) and *American Can Co. v. United Paper Makers*, 356 F.Supp. 495 (E.D. Pa. 1973) to establish a conflict in circuits. *American Can* is typical of every case the Union relies on. The parties there *had agreed* that the subject matter of both disputes was substantively arbitrable, and there was a stipulated submission agreement placing two grievances before the same arbitrator. The contract in question did not resolve the issue of consolidation of multiple grievances. There was no evidence of any other exclusion by the parties. The arbitrator concluded that the most sensible construction of the contract language permitted multiple grievances to be heard in a single arbitration proceeding. The court agreed on the basis of *U.S.A. v. Warrior & Gulf Navigation Co., supra,* dictated that *American Can Co.* court's holding was correct. It stated simply that on review of the contract terms between those parties, the arbitrator had neither violated the restrictions in the agreement nor exceeded his powers. Significantly, it stated:

> "Our conclusion should not be read to mean that this issue is always procedural or that an employer may not include a specific provision in the contract to prohibit multiple grievance arbitration. We conclude that the award . . . can be rationally derived from the agreement." 356 F.Supp. at 499.

The court also characterized the parties' submission to the arbitrator of the multiple grievance question as submission to the arbitrator of an issue of disputed arbitrability, noting that neither party had waived its right to seek judicial review on that issue. 356 F.Supp. 397, *n.*1. Thus it did not reach the

fact situation addressed by the court below, in which the arbitrator disregarded the *collateral agreement of the parties from which he drew his authority.* Once he exceeded his authority, *American Can* too, suggests that his award will not be enforced, but the basic holding is factually inapposite to the case at bar. The distinguishing factor here is that there was no agreement to submit that matter to arbitration because the parties had withdrawn the matter from Lazar's consideration.

The other cases cited by the Union, particularly, *Avon Products* have a similar fact pattern. Where different grievances have been submitted to one arbitrator, under a collective bargaining agreement, silent on consolidation and absent other evidence of exclusion, the court in *Avon Products* reached the conclusion that arbitrability may be determined by the arbitrator, subject to later judicial review. Facts identical to those in *American Can* existed. If he acts within the scope of his authority, the court must affirm his decision: If he does not, the award can not be enforced. What the courts have said is that if the parties agree to arbitrate a particular class of matters, the "subject matter" is arbitrable; if they do not, it is not, no matter how the issue is cast. Its conclusion did not depend upon a "broad" or "narrow" *form* of clause, except that, as some cases such as *UAW v. Folding Carrier Corp., supra,* note, again in the absence of other evidence, the language "any dispute" may disclose an intention by the parties to submit anything to arbitration, with no exceptions whatsoever. In those cases, any disagreement is arbitrable by definition – the conclusion reached by the court in *Folding Carrier Corp. supra.* Of interest too, is the Tenth Circuit's adoption in *Sav-on, supra,* 508 F.2d at 502, as *"the better rule"* the Eighth Circuit's statement in *Kansas City Luggage and Novelty Workers Union, Local No. 66 v. Neevel Luggage Mfg. Co.*, 325 F.2d 992, 994 (8th Cir. 1964), that "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.

The point in neither *Sav-on* nor the decision below conflicts with *Avon.* Different issues are posed and different rules apply. The cases. to use an old saw, are no more

comparable than apples and oranges. Those cases are not a "morass of nomenclature" as said the district court, but they turn simply on what the parties in each case allow an arbitrator to do. They depend upon the facts, not technical words of art, since congress and the courts have upheld the rights of parties to fashion a "common law of the shop". *U.S.A., supra,* 363 U.S. at 580.

In *American Sterilizer Co. v. UAW,* 341 F.Supp. 522 (W.D. Pa. 1972), a fact situation almost identical to *American Can* was presented. The court only decided that the question of multiple grievances is a matter which may be arbitrable. There were three specific submissions by agreement between the parties, the American Arbitration Association was asked to appoint *only* one arbitrator and there were no other facts which would indicate the arbitrator had or lacked authority to consolidate grievances. The court merely established that the arbitrator's decision was reviewable and then decreed that the subject matter arbitrable under the tests established in *U.S.A. v. Warrior & Gulf Nav. Co., supra,* and *Atkinson v. Sinclair Refining Co., supra.* All the court said was that consolidation generally is an arbitrable matter unless it is withdrawn from consideration by the parties, the issue posed here. In contrast, here three separate letters requesting lists of arbitrators on 71-8, 72-1 and 72-2 were sent to the FMCS, separate answers were received and separate procedures were used – all without objection by the Union – to select arbitrators. There was no submission agreement between the parties and there is essentially-uncontradicted evidence of an exclusionary agreement and fraudulent concealment by the Union. Furthermore, these parties considered the matter substantial. Conoco has not conceded the threshold issue of *American Sterilizer* and other cases where the parties had already agreed to let the arbitrator decide the issue and then challenged his decision. Conoco never did that and has never lost or abandoned its rights to contest his authority to decide.

In *Fitchburg Paper Co. v. McDonald,* 242 F. Supp. 502 (D. Mass. 1965), the court was confronted with three unrelated grievances, a single arbitrator and submission without objection. The court held that the "subject matter" of each

grievance fell within the collective bargaining agreement. Note the observation of the court:

> "The court must, of course, determine for itself, that the parties have made an agreement to arbitrate and that the issue involved on its face falls at least generally within the class of questions covered by the arbitration agreement." 242 F.Supp. at 504.

That is the issue here, but in *Fitchburg* it was conceded. The same facts distinguish *Teamsters, Local 469 v. Hess Oil & Chem. Co.,* 226 F.Supp. 452 (D. N.J. 1964), and *Trailor Eng. & Mfg. Div. v. U.S.A.,* 220 F.Supp. 896 (E.D. Pa. 1963). *Trailor* acknowledged two questions exist: the "threshold" one of consolidation and, then, the merits. The only other noteworthy thing is that *Trailor* says nothing about the Union's obligation to file a grievance over a substantive violation of the contract. It said that matter was arbitrable under the contract and a matter for presentation to the arbitrator. *Tobacco Workers International Union, Local 317 v. Larillard Corp.,* 448 F.2d 949 (4th Cir. 1971) also is factually inapposite as it involved *one* arbitration involving numerous or "representational" grievants and was filed as such. Our case involved two "representational" grievances and the issue was not the standing of two people to associate in one grievance but *consolidation* – a point never discussed, reached or considered in *Tobacco.*

In *Avon* and *American Can,* the parties agreed that the issue of consolidation itself presented arbitral subject matter and submitted it, and the subject matter of individual grievances, to the arbitrator. The collective bargaining agreement did not preclude consolidation. Later, the loser tried to withdraw its submission and each court, with reason, said that once the parties had submitted the matter, it was within the perview of the arbitrator to decide whether consolidation was proper. As *Wiley* said, the arbitrator

> ". . . may of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining

> agreement. When the arbitrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award.

The parties contract establishes the system of industrial jurisprudence which binds the court, as the arbitrator is bound by that to which the parties agree. If he follows it, the courts will respect his decision: if he ignores it, as here, they will reject. *See Schlesinger v. BSVE, Local 252,* 367 F.Supp. 760, (E.D. Pa. 1973); *UAW, Local 1078 v. Anaconda American Brass Co.,* 256 F.Supp. 686 (D. Conn. 1966); *Stop & Shop Companies, Inc. v. Gilbane Bldg. Co.,* 304 N.E.2d 429, 431 (Mass. 1973), holding that a right to consolidate multiple grievances is subject to judicial scrutiny since the law requires the court to "adhere to the method established by the contract and forego the rewriting of the contract for the parties." The last case recognized that what is arbitrable under the parties' agreement is a matter of substance for review. What is clear from those cases also is recognized by *HREU v. Las Vegas Hacienda, Inc., supra,* that without agreement, manifested by conduct, by a written contract, by a submission agreement, by an express negative clause or exclusionary agreement or by some other means, arbitrability does not exist and an arbitrator has no fundamental authority. That applies equally to consolidation. *See UAW v. White Motor Corp.,* 86 LRRM 2246 (D. Minn. 1974); *Humble Oil & Ref. Co. v. Teamsters Local 866,* 447 F.2d 229 (2d Cir. 1971); *Torrington Co. v. UAW,* 362 F.2d 677 (2d Cir. 1966). It is apparent that not only the arbitrator but also the trial court disregarded the past practice of the parties in construing the exclusionary agreement and Conoco's "long standing policy of opposition to consolidation of grievances for hearing".

That is precisely the point advanced here, for there was a specific affirmative agreement which resulted in withdrawing the "subject matter" of consolidation of 71-8 and 72-1 from the sphere of arbitrable action by the arbitrator. The evidence established that there was a valid exclusionary agreement, that it was hidden from the arbitrator and that he was deprived of knowledge of the extent and limits of his power. He is not to be forgiven, however, for *he* did *not* determine the practice of

these particular parties even though he acknowledged in general it was a matter of substance. It is axiomatic that actions in excess of one's authority, even if undertaken in good faith, remain void. Good faith *does not* stamp the imprimatur of validity upon illegal action in court or in arbitration and that is the essence of the Union's case – that Lazar acted innocently and the award should be enforced against defendant even though procured by fraud. Plainly, Lazar's award did not "draw its essence from the collective bargaining agreement" as required by *U.S.A.*, and properly was denied enforcement by the Tenth Circuit.

III. The decision below is consistent with national labor policy and imposes no undue restraints on the arbitral process.

At page 17 of its Petition, the Union characterized the Tenth Circuit decision as turning solely upon Plaintiff's Exhibit 1 and labels it the only submission agreement. That single correspondence was the culmination of the parties' collateral agreement (Dx A-I) and consolidation was procured by the Union's fraud. The parties' agreement was defined other than in the collective bargaining agreement, but *Wiley* recognized the compelling force of such an agreement and insulates it from the attack the Union makes on it. The Union is intellectually dishonest in stating that it did not intend the submission agreement to be a limitation of the arbitrator's authority under the collective bargaining agreement. The side agreement between the parties was what determined that matter. Also, as noted above, grievances 72-1 and 71-8 were never "united" except for the convenience of discussion by Mr. Zeien with representatives of the Union Workmen's Committee. Never, at any stage of the arbitration proceedings were the matters in dispute consolidated. The Tenth Circuit has been careful to express and follow national labor policy:

> "We recognize the national policy that doubts are to be resolved in favor of arbitrability. That policy does not apply where, as in the instant case, there is an express provision excluding a particular grievance from arbitration. Warrier & Gulf, 353 U.S. at 584-585. We

> may not ignore the plain wording of the contract which excludes from arbitration any issue pertaining to the status of an employee under the Company retirement plan. District 50, UMW v. ChrisCraft Corp., 6th Cir., 385 F.2d 946, 949-950, 67 LRRM 2124." *Local 2-124 v. American Oil Co., supra,* 91 LRRM at 2204.

By upholding the parties' agreement the Tenth Circuit introduced no hypertechnical concept of jurisdiction into the arbitral arena. Instead, it followed the dictates of *U.S.A., Atkinson,* and *Wiley* by compelling parties to live up to their own agreement. Accordingly, *Food Workers v. A & P Tea Co.,* 415 F.2d 185 (3d Cir. 1969) is inapposite for it deals with the necessity of having formal pleadings in arbitration matters. That was not the issue posed to the court, but whether the arbitrator violated an agreement defining arbitrability. Indeed, it is the Union that has relied upon a "hypertechnical theory of 'pleading'" when it points to defendant's exhibits A through I, and cries that there is no specific formal agreement set forth in any one of them. Those documents are not "a single incidental correspondence" which was not intended by the parties to set out the limits of arbitral authority in this case, as said by the Union in its Petition at page 18. That is a clear misrepresentation of the issues in this case. No side dispute arose, but the central issue here, and the only one ever argued by Conoco, pertained to improper submission of grievance 72-1. The Union neglects to discuss the written and oral communications between the parties relative to that issue, and also ignores the fraud it practiced on the arbitrator and the court. While Lazar's award may have drawn its essence from the collective bargaining agreement, it surely did not draw its essence from the collateral agreement recognized in *Wiley* and certainly is not insulated from scrutiny by fraud practiced by the Union.

Next, the Union argues, in essence, that Conoco failed to raise issue of jurisdiction properly. It must rely upon a "hypertechnical theory of 'pleading'" that language satisfactory to the Union was not included in Mr. Elliott's objection to the arbitrator. No waiver of jurisdiction ever has been applied to arbitration: the inquiry is of substantive

arbitrability to be made by the court. It is not foreclosed by what the arbitrator concludes. *E.G., Local 782 v. Sav-on Groceries, supra.* All three defenses raised below were submitted under the head of jurisdiction and were raised by Mr. Elliott's letter to Lazar. The Union admitted that his letter of September 15, 1972, asserted, "*that the arbitrator lacked authority to consolidate the grievances. . .*" That language was derived from Article V, §6 of the collective bargaining agreement and was specifically cited to Lazar (Px. 15). Mr. Elliott also reiterated that the Company's long-standing policy of opposition to consolidation of grievances, putting the arbitrator on notice of past practice. That Conoco did not use the exact words of its extrinsic agreement is meaningless. Under all extant case law, objections to jurisdiction were preserved, for if the facts deprive the arbitrator of authority the parties' conduct cannot confer jurisdiction later. In addition, the argument is no defense to fraud, which could not have been raised prior to this suit. The Union ignores that matter, and attempts to avoid that conclusion by misstating that 71-8 was "united" with 72-1. The testimony of all witnesses contradicts that conclusion. The knowing refusal of the Company to participate in the merits does *not* change that either, for the cases are split on the effect of failure to participate, as some courts have held that participation results in a waiver of jurisdictional defects. Conoco chose to be safe rather than merely rely upon the majority view that a jurisdictional defect cannot be waived. *See Local 719, BCW v. National Biscuit Company, supra.*

The cases cited by the Union are readily distinguishable from the case at bar. Conoco validly contests jurisdiction and arbitrability here. *See Local 782 v. Sav-on Groceries, supra. Washington-Baltimore Newspaper Guild v. Washington Post Co.,* 367 F.Supp. 917 (D. D.C. 1973), concerned a failure to present to the arbitrator a claimed defense of set-off. The difference between a procedural defense and a jurisdictional infirmity is apparent from a review of the Federal Rules of Civil Procedures 8 and 12. Rule 8 defines certain matters as affirmative defenses, including, incidentally, set-off by way of counterclaim. However, Rule 12(h)(3) provides that *if at any time it appears to the Court that it lacks jurisdiction over the subject* matter, it shall dismiss the action. One does not waive

that defect by not raising it in a manner most convenient to the opposition. As stated in WRIGHT & MILLER, FEDERAL CIVIL PRACTICE AND PROCEDURE, §1393, ". . .not only is it impossible to waive this defense," but

> ". . . a question of subject matter jurisdiction may be presented by any interested party at any time . . . Furthermore, *it may be interposed as a motion for relief from a final judgment under Rule 60(b) (4) or presented for the first time on appeal.*"

A well-reasoned rule that is, for without subject matter jurisdiction, the court, or in this case, the arbitrator, had no authority or competence, i.e. "power", to hear and decide the case and order someone to do something. Without belaboring the point, *Washington-Baltimore Newspaper Guild* involved set-off, which, under *Wiley*, falls within the exclusive province of the arbitrator. As under the Federal Rules of Civil Procedure, failure to raise that as a defense results in a waiver of it as a defense. It has nothing to do with any of the issues posed for review before this court. In *Washington-Baltimore Newspaper Guild v. Washington Post Co., supra,* and in *Mogge v. District 8, IAM,* 454 F.2d 510 (7th Cir. 1971), the issue involved the appearance of a witness with new evidence. Those cases turn upon avoiding piecemeal presentation of the evidence. In the former case, the court considered the matter *procedurally* under Rule 60(b) in refusing to reconsider the matter and found it properly to fall within the discretion of the arbitrator. *Mogge* is distinguishable on similar grounds. In sum, the arbitrability of consolidating 71-8 with 72-1 properly was before the court, and the exclusionary agreement precluded the court's finding that the arbitrator had the authority to proceed. That defense was not and could not have been waived at any time, and therefore, properly was before the trial court.

The next specious argument the Union raises pertains to delay and expense. The Union's reliance on *Wiley* is misplaced for the concern of this Court is to prevent delay *prior* to the time of arbitration, and all the arguments advanced at 376 U.S. 557-559 pertain solely to that issue and not to raising

the spectre of delay to justify destruction of parties' substantive rights. The court was only concerned with precluding one party from using procedural defenses inexplicably intertwined with "the merits" to preclude arbitration at all. Here the arbitration was had and the matter of delay and expense is secondary.

The Tenth Circuit's decision will not affect consolidation of grievances one bit. Perhaps it may place a premium on negotiation for inclusion in the contract rather than trying to obtain consolidation by trick or fraud, but once the subject matter is arbitrable and there is no agreement precluding it, consolidation lies within the province of the arbitrator. All this decision has done is made it much more difficult for parties to renounce their obligations under a collective bargaining or other agreement. The remedy of summary judgment for a recalcitrant party once consolidation is *properly* ordered is in nowise different. It is clear that a suit to compel arbitration is much cheaper than going all the way to the United States Supreme Court on the issue of substantive arbitrability.

At page 20 of its Petition, the Union announces that is impractical to require consolidation as a totally separate grievance. Whatever the merits of that argument, it was decided here because the parties agreed it was a matter of substance and one, which for 72-1 and 71-8 was withdrawn from the arbitrator. Under all Supreme Court cases discussed above, the residual power to make that determination resides in the parties as the genesis of the common law of the shop and the Tenth Circuit properly recognized and applied those principles. Because the Union asserts a proposition does not make it so, and here there was not one reference to the merits of the arbitration or what was decided therein. There is no "impossibility" which precludes this Court's examining this matter after the fact and making a determination of arbitrability. All evidence related to the collateral agreement and none pertained to the merits. Conoco never contested the merits in court. Regardless of the beneficent purposes consolidation serves generally, for these parties and they decided that the drawbacks outweighed the benefits to be gained. Conoco's

position has not been to exult legal technicality over arbitral substance. Rather it and the Tenth Circuit only insisted that both parties be bound by any agreement they reach at arms length regarding their common law of the shop. That decision was proper.

CONCLUSION

Since this case turned upon a consistent and proper extension of federal law, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROVIRA, DEMUTH & EIBERGER

Carl F. Eiberger, No. 2842

Russell P. Rowe, No. 2443

1600 Western Federal Savings Building
718 Seventeenth Street
Suite 1600
Denver, Colorado 80202
Telephone (303) 629-1800

Attorneys for Respondent

Of Counsel:

THOMAS B. MONTGOMERY
CONTINENTAL OIL COMPANY
P.O. Box 2197
Houston, Texas 77001

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 1976, three copies of the within RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, were mailed, postage prepaid to John S. McKendree and Jonathan Wilderman, Attorneys at Law, 1050 Seventeenth Street, Suite 2500, Denver, Colorado 80202, counsel for petitioner. I further certify that all parties required to be served have been served.

Carl F. Eiberger

/s/ Carl F. Eiberger

APPENDIX A

BEFORE

A PANEL OF ARBITRATORS

In the matter of arbitration between	)	
Denver Local 2-477, Oil, Chemical and Atomic Workers International Union, AFL-CIO,	)	Concerning the assignment of over-time work out of classification; grievance #71-8, filed by Mr. Larry L. Osborne
Union,	)	
and	)	
Continental Oil Company and its Denver Refinery.	)	

UNION'S MOTION TO CONSOLIDATE GRIEVANCE 71-8 WITH 72-1 FOR HEARING AND AWARD.

COMES NOW, Denver Local 2-477 Oil, Chemical and Atomic Workers International Union, AFL-CIO, and moves that panel of arbitrators in the within matter to consolidate for hearing and award grievance number 72-1, concerning the assignment of overtime out of classification, filed by Mr. Larry L. Osborne, with grievance 71-8, and as grounds therefore, shown unto the arbitrators as follows:

1. Grievance number 71-8, filed by Mr. Larry L. Osborne, is procedurally and substantivally arbitrable and properly before the panel of arbitrators on its merits.

2. That grievance number 72-1, filed by Mr. Larry L. Osborne, is procedurally and substantively arbitrable, but the company has refused to consolidate said grievance for hearing

before the within panel without legal cause, justification or excuse.

3. Grievance number 72-1, filed by Mr. Larry L. Osborne, concerns the identical issues, both legally, factually and contractually as grievance number 71-8; grievance number 72-1 reached the arbitration stage at the same time as grievance number 71-8; the issues presented in grievance number 72-1 are identical with the issues presented in grievance number 71-8; and the company has agreed to consolidate and join grievance 71-8 with grievance 72-1, but now unjustly refuses to continue with consolidation and joinder as follows:

(a) Grievance number 71-8, filed by Mr. Larry L. Osborne, was filed on December 16, 1972, copy of which is marked exhibit "A", copy attached hereto and incorporated herein by reference.

(b) Grievance number 72-1, filed by Mr. Larry L. Osborne, was filed on January 20, 1972, copy of which is marked exhibit "B", copy attached hereto and incorporated herein by reference.

(c) On or about February 11, 1972, Mr. J. T. Zeien, Manager of Operations, Refining Department, of the company met with the Workman's Committee of the union; and as suggested by Mr. Zeien, grievance number 71-8 and grievance number 72-1 were discussed as one.

(d) On or about February 17, 1972, Mr. J. T. Zeien, Manager of Operations, Refining Department, of the company answered both grievance number 71-8 and grievance number 72-1 after jointly considering both grievances, copy of which is marked exhibit "C", copy attached hereto and incorporated herein by reference.

(e) On or about April 12, 1972, Mr. J. T. Zeien, Manager of Operations, Refining Department, of the company, named Mr. Cooper S. Allen, Director of Personnel Relations at the company's Billings refinery, as the company arbitrator for both grievance 71-8 and grievance 72-1, with no indication of any intent to change the company's position of considering the two

grievances jointly, copy of which is marked exhibit "D", copy attached hereto and incorporated herein by reference.

(f) On or about May 10, 1972, union arbitrator, Mr. Robert G. Steele, informed Mr. Cooper S. Allen, company arbitrator, that it was the union's position that grievance number 71-8 and grievance 72-1 should continue to be considered jointly and the matter heard by only one impartial arbitrator, copy of which is marked exhibit "E", copy attached hereto and incorporated herein by reference.

4. On May 5, 1972, these two grievances reached the arbitration stage; the Articles of Agreement between the parties does not clearly and unambiguously prohibit consolidation; the parties intended the grievance and arbitration machinery to be efficient and expeditious; and as a consequence, the grievance and arbitration machinery mandates joinder and consolidation.

5. The weight of arbitral opinion is that simultaneous arbitration of all grievances which reach the arbitration stage at the same time can be compelled by either party unless the arbitration clause of the collective bargaining agreement clearly and unambiguously provides otherwise. Arbitrator Warns in 27 LA 586, 588-589; Luskin in 25 LA 171, 172-173; Feinberg in 23 LA 588, 589-590; Williams in 23 LA 13, 14-15; Rader in 20 LA 441, 442-443; Trotta in 13 LA 878-879; Gregory in 12 LA 305, 306-307. This rule was upheld by the New Jersey Superior Court in *Electrical Workers v. Kidde Manufacturing Company*, 12 LA 446, 448 (1949).

6. The policy in favor of simultaneous arbitration is that the arbitration of multiple grievances is reflective of "the best ideals of the whole arbitration process, which are devoted to efficiency, expeditious disposition and economy". *Stewart-Warner Corp.*, 12 LA 305, 306 (Gregory, 1949); "Substantive Aspects of Labor Management in Arbitration," 28 LA 943, 944 (1954). In *Sylvania Electric Products, Inc.*, 24 LA 199, 201-205 (Brecht, 1954), grievances filed at the start of the

arbitration hearing pursuant to Rule 7 of the American Arbitration Association were accepted by an arbitrator against the objection of one party where they added no new issue, arose from the same action as the grievance specifically identified in the demand for arbitration, and were fully anticipated in that demand.

WHEREFORE, Denver Local 2-477 Oil, Chemical and Atomic Workers International Union, AFL-CIO, prays the arbitration panel enter its order directing and awarding that grievance number 71-8, filed by Mr. Larry L. Osborne, and grievance number 72-1, filed by Mr. Larry L. Osborne, be consolidated and joined for hearing and award on October 3, 1972.

Denver Local 2-477 Oil, Chemical
and Atomic Workers International
Union, AFL-CIO.

By
Dan C. Edwards, International
Representative,
Oil, Chemical and Atomic Workers
International Union, AFL-CIO,
6930 Jasmine Street
Commerce City, Colorado 80022

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing, **UNION'S MOTION TO CONSOLIDATE GRIEVANCE 71-8 WITH 72-1 FOR HEARING AND AWARD,** by depositing same, postage pre-paid, certified mail, return receipt requested, in the United States mail, addressed to Mr. C. S. Allen, Company Arbitrator, P.O. Box 2548, Billings, Montana 59103, on this 12th day of September, 1972

Dan C. Edwards

Exhibit "A"

Oil, Chemical and Atomic Workers
International Union

Complaint or Grievance Report

Grievance No. 71-8 **Date** 12-16-1971

Subject 4 hours of overtime **Local No.** 2-477

Date Complaint Occurred 12-10-1971

Company Continental Oil Co. **Location** Denver #9 Refinery
5801 Brighton Blvd.

Complainant's Name Larry Osborne Commerce City, Colo.

Address 60 Leonard Lane **Phone No.** 466-0135
Northglenn, Colorado

Job Crude Unit Controlman **Dept.** Operations

Service in Job _____ **In Dept.** _____ **In Co.** _____

Foreman Frank Bianco **Supt.** Mr. R. B. Blomeyer

Nature of Grievance

Overtime was given to an employee who was not in that classification.

State who, what, when, where, why and settlement

On December 10, 1971 Mr. Frank Bianco gave four hours of overtime to John Winfrey, who at that time was an G.R.P. Controlman. The overtime occured in the Crude Unit Controlman available even though he had worked 12 hours, he still should have been asked if he wanted to stay for the additional four hours.

The Union feels that the Company has violated Article VI Section 2 and Paragraph a, Article 9 Section 14, and/or

any other Articles which might apply in the Articles of Agreement between Continental Oil Company and Oil Chemical and Atomic Workers International Union and that the employee should be paid four hours overtime at double time rate as the overtime would have been in excess of 12 hours.

Signatures /s/ Larry Osborne _____

_____ _____

Exhibit "B"

Oil, Chemical and Atomic Workers International Union

Complaint or Grievance Report

Grievance No. 72-1 **Date** January 20, 1972

Subject Overtime (8 hrs) **Local No.** 2-477

Date Complaint Occurred January 11, 1972

Company Continental Oil Company **Location** Denver Refinery #9 P.O. Box 40 Commerce City, Colo.

Complainant's Name Mr. Larry Osborne 60 Leonard Lane

Address Northglenn, Colo. 80233 **Phone No.** 466-0135

Job Crude Unit Controlman **Dept.** Operations

Service in Job _____ **In Dept.** _____ **In Co.** _____

Foreman Mr. Leonard Brandt **Supt.** Mr. R. B. Blomeyer

Nature of Grievance

Overtime given to employee who was not working in the Crude Unit Classification.

State who, what, when, where, why and settlement

On January 11, 1972 Mr. Leonard Brandt (Shift foreman Denver Refinery) gave eight hours overtime to Mr. Buddy Watkins, who at that time was working in the T.C.C. Classification. The overtime occurred in the Crude Unit Classification, Mr. Larry Osborne, Mr. Don Kapus, Mr. Jay Hooper, and Mr. Jack Hindi, who were Crude Unit Controlman should have been given this eight hours overtime.

The Union feels that the company has Violated Article VI Section 2 Paragraph a, and Article IX Section 14, and/or any other Articles which might apply in the Articles of agreement between Continental Oil Company and the Oil Chemical and Atomic Workers International Union.

We believe that the eight hours pay at time and one half for this shift (evening Shift). Should be distributed to the Crude Unit Controlman that were available to work this shift.

Signatures /s/ Larry Osborne _____

/s/ Thomas J. Hooper _____

Exhibit "C"

February 17, 1972

Mr. R. J. Abbott, Chairman
Workmen's Committee
Denver Local 2-477 OCAWIU
181 E. 109th Place
Northglenn, Colorado 80233

Dear Mr. Abbott:

This is in answer to Grievances 71-8 and 72-1 concerning assignment of overtime out of classification which we discussed in Denver on February 11, 1972.

These two issues were extremely involved as to detail. Because of this, a number of reasons were given – pro and con – as to why this practice could or could not be done. In my estimation, the significant factor involves past practice.

Back through the years, it was agreed that overtime had been worked – both in and out of classification – twelve hours and over twelve hours, without a grievance. The significant point here is that a grievance was filed only after double time after twelve hours was negotiated into the last contract. Even since then, other instances of this nature have occurred with no grievance filed.

It is apparent to me that the Union has historically allowed management to decide this point using such things as qualifications, safety, etc. to determine how overtime was filled. I agree that this is the way it should be and, therefore, support the procedures now in use at the plant and deny both grievances.

Very truly yours,

J. T. Zeien
Manager of Operations
Refining Department

Exhibit "D"

April 12, 1972

Mr. Robert Jay Abbott, Chairman
Continental Workmen's Committee
Denver Local 2-477 OCAWIU
181 East 109th Place
Northglenn, Colorado 80233

Dear Mr. Abbott:

I have before me your correspondence announcing your intention to arbitrate Grievances 71-8, 72-1, and 72-2.

Mr. Cooper S. Allen, Director of Personnel Relations in our Billings Refinery, will serve as the Company arbitrator and is prepared to meet with Mr. Edwards on number 72-2, and with Mr. Steele on numbers 71-8 and 72-1 at any time during the week of April 24.

Mr. Allen will await your call to discuss a time during that week convenient to you.

Yours very truly,

J. T. Zeien
Manager of Operations
Refining Department

gl
CC:
Mr. R. B. Blomeyer
Continental Oil Company
Denver Refinery
Commerce City, Colorado 80022

Mr. Cooper S. Allen
Continental Oil Company
P.O. Box 2548
Billings, Montana 59103

Exhibit "E"

Oil, Chemical and Atomic Workers
International Union

DENVER LOCAL No. 2-477 DENVER, COLORADO

CERTIFIED MAIL 867214
RETURN RECEIPT REQUESTED

May 10, 1972

Mr. Cooper S. Allen, Company Arbitrator
Continental Oil Company
P. O. Box 2548
Billings, Montana 59103

Dear Mr. Cooper:

Reference is made to your two letters of May 5, 1972, in which you request a separate list of arbitrators for grievances 71-8 and 72-1.

These two grievances are similar in nature and were tied together in Mr. Zeien's answer to the Union in his letter dated February 17, 1972. As you well know, these two grievances have been handled together from that point on, and you were advised on May 3, 1972, that the Union wished to procede in that manner.

It is the Union's position that these two grievances be heard by only one impartial arbitrator.

Yours truly,

Robert G. Steele,
Arbitrator for the Union
6473 Reed Court
Arvada, Colorado 80002

c–Robert J. Abbott
file

APPENDIX B

LETTERS BETWEEN THE PARTIES

June 1, 1972

C. S. Allen Director of Personnel Relations
Continental Oil Company
P.O. Box 2548
Billings, Montana 59103

Dear Mr. Allen:

This letter will serve to introduce us as the attorneys representing Oil, Chemical and Atomic Workers International Union Local 2-477 concerning grievances 71-8 and 72-1.

We are in receipt of your letter dated May 16, 1972 addressed to Robert G. Steele concerning your decision requiring two separate arbitrations of these grievances. As you know, these grievances deal with the same facts and contractual provisions. We believe two arbitration hearings would be a needless waste of time and expense and contrary to the collective bargaining provisions.

May we hear from you forthwith setting forth your agreement to submit both of these matters to the same arbitrator. We appreciate your courtesy and cooperation.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT

/s/ John W. McKendree

JWMc:kg

cc: Mr. Fred Mosher
cc: Mr. Dan C. Edwards
cc: Mr. Robert G. Steele

June 7, 1972

Mr. John W. McKendree
Hemminger, McKendree, Vamos & Elliott
Suite 1818 Prudential Plaza
1050 Seventeenth Street
Denver, Colorado 80202

Dear Mr. McKendree:

This is in response to your letter of June 1, 1972.

The company's position is that two separate arbitration hearings on two separate grievances is not contrary to the collective bargaining agreement between the parties. In fact, you will notice that the contract does not address itself to multiple grievances. Furthermore, the facts of both grievances are not the same, even though they may be based on the same contract provision. Therefore, the company's position is that the two grievances should be presented separately and heard before two different arbitrators.

If the union is agreeable, the company will agree to waive the time limitations on Grievance 72-1, thereby deferring arbitration until an opinion and decision on Grievance 71-8 has been rendered by an impartial arbitrator. At that time, both parties could decide on the future disposition of Grievance 72-1.

Very truly yours,

C. S. Allen
Director of Personnel Relations
Billings Refinery

rr

B-3

June 10, 1972

Mr. C. S. Allen
Director of Personnel Relations, Billings Refinery
Continental Oil Company
P.O. Box 2548
Billings, Montana 59103

Dear Mr. Allen:

Thank you for your letter of June 7, 1972.

We were sorry to learn that you are not in agreement with us concerning consolidation of these grievances for hearing.

I am in the process of conferring with our client concerning your suggestions of waiving time limitations on Grievance 72-1, thereby deferring arbitration until an opinion and decision on Grievance 71-8 has been rendered by an impartial arbitrator.

You shall have our position shortly.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT, P.C.

John W. McKendree

JWMc:sl

cc: Mr. Fred Mosher
cc: Mr. Dan C. Edwards
cc: Mr. Robert G. Steele

B-4

June 19, 1972

Mr. C. S. Allen
Director of Personnel Relations
Billings Refinery
Continental Oil Company
Post Office Box 2548
Billings, Montana 59103

Dear Mr. Allen:

Once again we wish to thank you for your letter of June 7, 1972. Since my letter to you dated June 10, 1972, we have had an opportunity to confer with our client on your suggestions. We would take this opportunity to reiterate once again that we believe that two arbitration hearings would not only be a needless waste of time and expense but clearly would be contrary to the collective bargaining agreement's provisions. Nevertheless, we understand that your company would be willing to agree with our client to waive the time limitations on Grievance 72-1, thereby deferring arbitration until an opinion and decision on Grievance 71-8 has been rendered by the impartial arbitrator. Do we understand, in this connection, that you are suggesting the parties then agree to dispose of Grievance 72-1 upon the same basis as Grievance 71-8 is resolved by the arbitrator's award?

May we hear from you on this latter subject matter at your earliest convenience.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT

John W. McKendree

JWMc:js

cc: Mr. Fred Mosher
cc: Mr. Dan C. Edwards
cc: Mr. Robert G. Steele

B-5

June 26, 1972

Mr. John W. McKendree
Hemminger, McKendree, Vamos
& Elliott
Suite 1818, Prudential Plaza
1050 Seventeenth Street
Denver, Colorado 80202

Dear Mr. McKendree:

Thank you for your letter of June 19, 1972.

My suggestion is that we agree to waive the time limits on Grievance 72-1 until an impartial arbitrator renders a decision on Grievance 71-8. After the award is given on 71-8, the Company and the Union may then agree to dispose of 72-1 on the same basis or proceed to arbitrate 72-1.

Very truly yours,

C. S. Allen
Director of Personnel Relations
Billings Refinery

rr

B-6

July 3, 1972

Mr. C. S. Allen
Director of Personnel Relations
Continental Oil Company
Post Office Box 2548
Billings, Montana 59103

Dear Mr. Allen:

Thank you for your letter of June 26, 1972.

Be advised that at the present time my client is considering your suggestions and its alternatives. We shall advise.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT

John W. McKendree

JWMc:sf

July 18, 1972

C. S. Allen
Director of Personnel Relations
Continental Oil Company
P. O. Box 2548
Billings, Montana 59103

Re: Continental Oil Company
Denver Local 2-477, OCAW
Grievances 71-8 and 72-1

Dear Mr. Allen:

Since my letter to you dated July 3, 1972, we have discussed the matters raised in your letter of June 26, 1972. Although we do not agree with all of your statements therein contained, nevertheless we agree to waive the time limits on grievance 72-1.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT

John W. McKendree

JWMc:kg

cc: Mr. Dan C. Edwards
cc: Mr. Robert G. Steele
cc: Mr. Robert J. Abbott
cc: Mr. Fred Mosher

July 24, 1972

Mr. R. G. Steele
6473 Reed Court
Arvada, Colorado 80002

Dear Mr. Reed:

We are unable to locate the letter which you mentioned to Mr. Allen when you called him in Lake Charles.

As soon as the letter is located, we will contact Mr. Allen, and he will get in touch with you.

Erma L. Gilliland
Secretary to Mr. Allen

/e

B-9

August 15, 1972

Mr. C. S. Allen
Director of Personnel Relations
Continental Oil Company
Post Office Box 2548
Billings, Montana 59103

Re: Continental Oil Company
Denver Local 2-477, OCAW
Grievances 71-8 and 72-1

Dear Mr. Allen:

As you know, on July 18, 1972, we addressed a letter to you which read as follows:

> "Since my letter to you dated July 3, 1972, we have discussed the matters raised in your letter of June 26, 1972. Although we do not agree with all of your statements therein contained, nevertheless we agree to waive the time limits on grievance 72-1."

We understand that the company is not promptly complying with the union's request and the company's contractual obligations to select an arbitrator in Grievance 71-8. When may we expect the company to sit down with us and select an arbitrator or otherwise comply with the contractural obligations in the contract.

We are hopeful to hear from you rapidly on this matter.

Very truly yours,

HEMMINGER, McKENDREE, VAMOS & ELLIOTT

John W. McKendree

JWMc:sf
cc: Mr. Dan C. Edwards
cc: Mr. Robert G. Steele
cc: Mr. R. J. Abbott
cc: Mr. Fred Mosher
CERTIFIED MAIL